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No. 87-

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

FARMERS & MERCHANTS BANK,

Petitioner,

v.

SARAH FORMBY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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March, 1988

QUESTIONS PRESENTED

1. Does the Age Discrimination in Employment Act, 29 U.S.C. Section 621 et. seq. (hereinafter the "ADEA") require an employer, when recalling laid off or terminated employees, to first recall persons within the protected age group under the ADEA or accord priority in recall to such persons over those not so protected?

2. Does a charge of age discrimination under the ADEA filed with the EEOC in which the only complaint made refers to an initial termination support jurisdiction in the district court of a subsequent failure to recall claim on which no separate or amended charge was ever filed?

3. Does an employer have a duty under the ADEA to accord an employee within the protected age group more favorable treatment over other employees not in the protected age group because of the protected employee's seniority in terms of years of employment with the employer?

4. Does an employer have a duty under the ADEA to accord an employee within the protected age group more favorable treatment over other employees not in the protected age group when making employment decisions?

5. In a reduction in force case under the ADEA, is an employer required to "bump" employees not within the protected age group under the ADEA in favor of employees within the protected age group, or with less seniority than employees within the protected age group under the ADEA?

6. Is it competent direct evidence of age discrimination under the ADEA where a statement is made by an officer of an

employer when informing an employee within the protected age group under the ADEA that the employee's job is being abolished and that the employee is therefore being terminated that, as the statement was described by the employee, "far be it from him [the officer] to let a young pretty girl go" - when the employee admits "that [reference to "young pretty girl"] was in regards to one that he told me he was terminated," where the evidence was uncontradicted that the officer who made the statement played absolutely no role in any of the employment decisions of the employer and specifically played no role relative to decisions concerning the employee and where the statement on its face indicates that the "young pretty girl" to which the statement refers was also simultaneously being terminated?

THE PARTIES BELOW

The parties are the Farmers and Merchants Bank of Cherokee County, Alabama and Sarah Formby. The only subsidiary of the Farmers and Merchants Bank is the F & M Realty Company, a corporation.

TABLE OF CONTENTS

Questions Presented.....i-ii

Parties Below.....iii

Table of Contents.....iv-v

Table of Authorities.....vi-viii

Opinions Below.....1

Jurisdiction.....2

Statutes or Constitutional Provisions.....2

Statement of the Case.....2

Reasons the Writ Should Be Granted.....11

Conclusion.....24

Certificate of Service.....25

Appendix:

Judgment on Jury Verdict.....A-1 to A-2

Per Curiam Order of Eleventh Circuit Affirming Without Opinion.....B-1

Per Curiam Order of Eleventh Circuit Denying Petitions for Rehearing and Rehearing In Bank Without Opinion.....C-1

Transcript of Trial.....D-1 to D-131

Age Discrimination In Employment Act,
29 U.S.C. Section 621, et seq.....E-1 to E-8

Petitioner's Motion For Summary
Judgment in District Court.....F-1 to F-3

Petitioner's Motion For Entry Of Judment
Notwithstanding The Verdict Or,
Alternatively For A New Trial.....G-1 to G-8

The Age Discrimination Charge Filed By
The Respondent With The Equal Opportunity
Economic Opportunity Commission.....H-1

TABLE OF AUTHORITIES

Cases:

Barnes v. Southwest Forest Industries, Inc.,
814 F. 2d 607 (11th Cir. 1987).....13,14,15,16,20-21

Caldwell v. National Association of Home Builders,
771 F. 2d 1051 (7th Cir. 1985).....22

Coburn v. Pan American World Airways, Inc.,
711 F. 2d 339 (D.C. Cir. 1983).....18

Cuddy v. Carmen,
694 F. 2d 853 (D.C.Cir. 1982).....18

Goldstein v. Manhattan Industries, Inc.,
758 F. 2d 1435 (11th Cir. 1985).....18

Kehart v. Institute of Gas Technology,
630 F. 2d 1217 (7th Cir. 1980).....13

Krodel v. Young,
748 F. 2d 701 (D.C. 1984).....18

LaMontagna v. American Convenience Products, Inc.,
750 F. 2d 1405 (7th Cir. 1984).....20

Lawson v. Burlington Industries, Inc.,
683 F. 2d 863-864 (4th Cir. 1982), cert. denied 459 U.S. 944, 103 S.Ct. 257, 74 L.Ed. 2d 201(1982).....22

Miller v. International Telephone and Telegraph Corporation, 755 F. 2d 20 (2nd Cir. 1985).....23-24

Parcinski v. The Outlet Co.,
673 F. 2d 34 (2nd Cir. 1982).....13,17

Simmons v. McGuffey Nursing Home, Inc.,
619 F. 2d 369 (5th Cir. 1980).....20

Stacy v. Allied Stores,
768 F. 2d 402 (D.C. Cir. 1985).....13

Stanojev v. Ebasco Services, Inc.,
643 F. 2d 914 (2nd Cir. 1981).....13,14,17

Stendenback v. CPC Intern, Inc.,
691 F. 2d 735 (5th Cir. 1982).....20

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981).....17,18,19

Thomas v. Brown & Root, Inc.,
745 F. 2d 279 (4th Cir. 1984).....22

Tice v. Lampert Yards, Inc.,
761 F. 2d 1210 (7th Cir. 1985).....13,14,16

Transworld Airlines v. Thurston,
469 U.S. 111, 105 S.Ct. 613,
83 L.Ed. 2d 523 (1985).....14

White v. Mississippi State Oil and Gas Board,
650 F. 2d 540 (5th Cir. 1981).....20

Williams v. General Motors Corp.,
656 F. 2d 120 (5th Cir. 1981) cert. denied,
455 U.S. 943, 102 S. Ct. 1439, 71 L.Ed.
2d 655 (1982).....13

Statutes:

The Age Discrimination in Employment Act,
29 U.S.C. Section 621, et. seq.....2,9,10,12,13,17,19,24

Title VII of the Civil Rights Act of 1964,
42 U.S.C. 2000e, et seq.....17,18

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PETITION FOR A WRIT OF CERTIORARI TO
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Petitioner, Farmers & Merchants Bank, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Opinion Below

There is no written opinion of any court below. The entry of judgment by the district court on the jury's verdict in favor of plaintiff is reprinted as Appendix A. The decision of the Eleventh

Circuit Court of Appeals affirming the judgment without opinion is reprinted as Appendix B. The decision of the Eleventh Circuit Court of Appeals denying without opinion petitioner's petition for rehearing and for rehearing en banc is reprinted as Appendix C. The trial transcript is reprinted as Appendix D.

Jurisdiction

The judgment of the United States Court of Appeals for the Eleventh Circuit affirming without opinion the district court's entry of judgment in favor of plaintiff was entered on October 15, 1987. The timely petition for rehearing and rehearing en banc was denied by the United States Court of Appeals on December 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

Statutes or Constitutional Provisions Involved

The Age Discrimination in Employment Act, 29 U.S.C. Section 621 et. seq. is set forth at Appendix E.

STATEMENT OF THE CASE

Farmers and Merchants Bank ("The Bank") is located in Cherokee County, Alabama. Prior to January 1, 1985 the Bank had a main office located on Main Street in Centre, Alabama; a small branch known as the "Diane Branch" located also on Main Street within 2,000 feet of the main office; a branch in Leesburg, Alabama; and one in Cedar Bluff, Alabama, all within Cherokee County, Alabama. (App. D, pp. 15,52,76). Between 1983 and 1985, the Bank had experienced an embezzlement which resulted in the examin-

ing authorities requiring the Bank to write off millions of dollars in loans and, as a result, the Bank lost two million dollars in 1982. In November of 1984 a controlling interest in the bank was purchased by Birmingham attorney W. Eugene Rutledge. At that time the Bank was under a cease and desist order issued by the banking regulatory authorities. In 1984 the Bank lost $630,000.00 (App. D, pp. 74-76).

When Mr. Rutledge acquired control of the Bank in November, 1984,[1] a policy was formulated in an effort to reduce the Bank's operating expenses. The Bank at that time operated a Main Branch in Centre, Alabama and three other branches; the Diane Branch, also in Centre, the Leesburg Branch, a few miles from Centre and the Cedar Bluff Branch, also a few miles from Centre. (App. D, pp. 15,52,76). Part of the new policy designed to reduce operating expenses was to close the Diane Branch because it was located only 2,000 feet from and on the same street as the Main Branch and was not an economically viable unit. (App. D, pp. 76-77).[2] At that time, each of the Bank's three branches, Diane, Leesburg, and Cedar Bluff, employed two people except the Leesburg Branch which employed three. Leesburg had one manager and two tellers and the other two branches had one manager and one teller. The respondent Sarah Formby (hereinafter "Mrs. Formby") was the teller at the Diane Branch. (App. D, pp. 51-52; 20).

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[1] Mr. Rutledge became a member of the board of directors and chairman of its executive committee on November 17, 1984.

[2] The Diane Branch had originally been built primarily for the utilization of drive-in teller windows because the Bank's previous main office building did not have any drive-in windows. However, when the old main office building was replaced, the new building had drive-in tellers. (App. D, pp. 16-17).

Mrs. Formby worked at the Bank from September of 1974 until December 14, 1984, during which time her only job was as a teller. All of her time at the Bank was spent at the Diane Branch except for a year when she was at the main office. (App. D, pp. 35; 36-37).

The evidence at trial was undisputed that from the time Mr. Rutledge took control of the Bank he personally made all decisions regarding personnel. Mr. Rutledge thought it best to assume that responsibility himself since he was not a resident of Centre and would not be subject to the pressures on the Bank officers who lived there. Centre is a small town, and the discharges and layoffs, which he knew would be necessary to get the Bank on a sound business basis, might place those officers who lived in Centre in an unpleasant predicament with their neighbors and the friends and relatives of the discharged employees. The only thing that Mr. Rutledge knew about the two employees at the Diane Branch was that one was a manager and the other was a teller. He knew nothing about their ages. This was true when he made the decision to close the Diane Branch, when he made the decision to discharge Mrs. Formby and when she was discharged. (App. D, pp. 80-81; 77-78).

On December 14, 1985, Mrs. Formby was advised that the Diane Branch was being closed and that her job was abolished. On that date two employees from the main office were temporarily transferred to work at the Diane Branch until it was closed.[3] Mr. Rutledge did not think it wise for bank employees who had been

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[3]The Diane Branch could not be closed immediately after the decision was made to close it because the Bank first had to obtain permission from the regulatory authorities to close it. (App. D, pp. 94-95).

advised that their jobs had been abolished to continue working at the Bank and to handle money. (App. D, pp. 78-79). There were five or six other employees including tellers employed at the Main Branch or other branches, who were also terminated on December 14, 1985.[4] The Diane Branch has *never* been reopened. (App. D, pp. 54; 94-95).

Mrs. Formby testified that on December 14, 1984, the day she was terminated, when she arrived at the Diane Branch for work there were two women who had not previously worked there at the teller windows who said that they did not know what Mrs. Formby was supposed to do. Shortly thereafter, Mr. Richard Skates, then a vice-president of the Bank, came to the Diane Branch, took Mrs. Formby in the conference room, advised her that the Bank was closing the Diane Branch and that she was terminated. Mrs. Formby testified as follows concerning her discussion with Mr. Skates:

> And he named the other people that were being terminated. He also said that he - far be it from him to let a young pretty girl go - that was in regards to one that he had told me he was terminating...(App. D, pg. 38).

This statement about a "young pretty girl" is the statement which Mrs. Formby claims constitutes direct evidence of age discrimination. Mrs. Formby's own testimony, however, makes it clear that when Mr. Skates made the remark about "a young pretty girl" he was referring to someone who *was* being terminated at the

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[4] The manager at the Diane Branch, Colleen Ray, replaced the manager at the Leesburg Branch who resigned at approximately the same time the Diane Branch was closed. (App. D, pg. 33).

same time and that Mr. Skates said that *if* it had been up to him he would not have terminated her. It was *undisputed in the evidence* that it was *not* Mr. Skates who made the decision to terminate the plaintiff or any of the other employees who were simultaneously terminated, but rather Mr. Rutledge *alone* made *every* personnel decision after he had acquired control of the Bank, including all decisions as to terminations and layoffs.[5] The evidence was undisputed that Mr. Skates played no role whatsoever in any of the employment decisions of the Bank after Mr. Rutledge assumed control. Mr. Skates' statement to Mrs. Formby is simply one that *if* it had been up to him, which it was not, he would not have terminated a "young pretty girl" who *was in fact* being terminated at Mr. Rutledge's direction. (App. D, pp. 92; 84).

Mrs. Formby later complained that teller Linda Davis, in her late 30's or her early 40's, and teller Karen Freeman, in her 20's, were recalled *to their respective positions* at the Bank after they were laid off from their positions at the same time as was Mrs. Formby. However, it was undisputed that both of those ladies were rehired for reasons that had nothing to do with their age. Mr. Rutledge testified, without dispute, that Karen Freeman was recalled for two reasons: (1) she had the banking experience necessary to be a "floater," meaning that she could perform a number of jobs within the Bank; and, (2) her husband was the manager of the Big E Grocery Store in Centre which was a good Bank customer and for that reason recalling her would be beneficial to the Bank. Mr. Rutledge testified, without dispute, that Linda Davis was recalled

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[5] Mr. Skates was himself terminated by Mr. Rutledge in the fall of 1985. (App. D, pp. 84-85).

because she had experience in a number of different departments of the Bank, as Mrs. Formby did not, and could therefore be moved to different departments according to the needs of the Bank, which was most important to the Bank given its reduced number of employees.[6] Futhermore, both Linda Davis and Karen Freeman were advised at the time they were recalled that the recall was on a temporary basis and was subject to the financial health of the Bank. (App. D, pp. 79-80).[7] Mrs. Formby made no effort at trial to introduce evidence to show that the reasons given by the Bank for the recall of Davis or Freeman were false or pretextual.

The first time Mr. Rutledge ever saw Mrs. Formby to know that it was Mrs. Formby was on January 26, 1985, at the Bank's annual stockholders' meeting. Mr. Rutledge testified that Mrs. Formby accosted him outside the meeting room in the hallway of the Bank immediately following the meeting and that, in the presence of a number of stockholders who were also in the hallway, Mrs. Formby stopped him, and in an angry manner introduced herself and demanded her job back. Mr. Rutledge testified that he responded to her demand by stating that the hallway was not the place to discuss it, but that he would be glad to meet with her in his office the next week. (App. D, pp. 82-84). Mr. Rutledge testified that, based on this outburst, he came to the conclusion that she was a person who lacked judgment and was likely to lose her temper and whose personality was not one which he sought in a Bank employee. (App. D, pp. 85-86). Mrs. Formby did not ever

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[6] These are the only employees Mrs. Formby ever mentioned by name as being rehired and are apparently the "young girls" the plaintiff refers to throughout her testimony.

[7] Mrs. Formby testified that her *only* experience at the Bank was as a paying and receiving teller. (App D, pg. 35).

attempt to contact or meet with Mr. Rutledge the next week or at any other time pursuant to his offer or otherwise. (App. D, pg. 84).[8] The recall of Mss. Davis and Freeman about which Mrs. Formby complained at trial had already occurred at the time of the confrontation between Mr. Rutledge and Mrs. Formby at the stockholder's meeting.

Mr. Rutledge testified without dispute that the Bank's personnel policy regarding age was that the Bank sought to obtain the most experienced employees possible, which generally meant that they were older employees. (App. D, pg. 84). Mr. Rutledge testified that there were a number of employees of the Bank over age 40 years, including himself. For example, Mrs. Ann Akins who testified at trial on behalf of the Bank was 63 years old and had just been promoted to executive vice-president. (App. D, pg. 85)

On February 8, 1985, several weeks after her confrontation with Mr. Rutledge in the hallway at the Bank, Mrs. Formby filed a charge of discrimination with the Equal Employment Opportunity Commission ("E.E.O.C.") in which she claimed that her employment with the Bank had been *terminated* on December 14, 1984, that she was the only teller over 50 who was discharged and

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[8] Mrs. Formby admits that this confrontation took place and does not deny that other stockholders were present. She denies she *knew* she was rude or angry and denied that Mr. Rutledge asked her to come to his office. (R. 2-117-119). Her testimony was:

> I went up to Mr. Rutledge and introduced myself as Sarah Formby and a former employee and asked him if any opening in the main bank came open that I would love to have it, that I would love to work for him. And at the time, I didn't know he was angry and *I didn't know I was angry*. You're usually more humble, I think, when you're asking for the work than you would be normally at any other time. (Emphasis supplied) (App. D, pg. 99).

that she was replaced by a female less than 50. The evidence was undisputed at trial that Mrs. Formby was *never* replaced by *anyone* because the Diane Branch was never reopened. Mrs. Formby did not make any claim in her EEOC charge about the Bank's "failure to recall" her or the recall of others. (The EEOC charge is set forth at Appendix H). Plaintiff never filed any other or amended charge with the E.E.O.C.[9]

Respondent Sarah Formby filed on October 7, 1985, in the United States District Court for the Northern District of Alabama, a complaint against the Bank under the Age Discrimination in Employment Act, 29 U.S.C. Section 621 et. seq., Appendix E, (hereinafter the "ADEA"). Plaintiff alleged that on December 14, 1984 she was terminated from her employment at the Bank as a paying and receiving teller, that she was then 59 years of age, and that her termination was in violation of the ADEA. The plaintiff averred that prior to filing the action she had notified the Secretary of Labor of her claim by filing on March 29, 1985 a charge with the E.E.O.C. The complaint sought relief for back pay, an injunction requiring the defendant to reemploy the plaintiff, liquidated damages, attorneys fees and costs. The defendant answered the complaint on October 31, 1985, denied liability, and asserted affirmative defenses including the defense that the plaintiff was terminated for reasonable factors other than her age and that the Bank had acted in good faith.

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[9] Mrs. Formby made no reference in the E.E.O.C. complaint to Mr. Skates' alleged remark about a "pretty young girl" even though she did recite what Mr. Skates told her about termination. Moreover, there is a place on the form for the charging party, Mrs. Formby in this instance, to list the reasons she believed she had been discriminated against and, though she listed several reasons, she did not list Mr. Skates' alleged remark. (App. H).

On January 6, 1986, Mrs. Formby filed a Motion to Amend the Complaint to add a claim alleging that the Bank's *failure to recall* her constituted a violation of the ADEA. Mrs. Formby did not allege that she had filed any additional charges or notices with the E.E.O.C. or the Secretary of Labor. Mrs. Formby's motion to amend the complaint was granted by order entered February 28, 1986.

The Bank on March 24, 1986, answered the amended complaint, denied liabililty and asserted as an affirmative defense that the plaintiff had failed to comply with the administrative or procedural prerequisites of filing a claim with the E.E.O.C. as required by the ADEA prior to filing the amendment. The amended answer also reasserted the affirmative defenses previously plead.

On September 12, 1986, the Bank filed a "Motion for Summary Judgment or in the Alternative for Partial Summary Judgment" in which it claimed that it was entitled to summary judgment as to the entire case because Mrs. Formby had failed to produce any evidence that age played any part in the termination of her employment from the Bank. The Bank prayed in the alternative that should the court decline to grant summary judgment as to the entire case, that the court would grant partial summary judgment as to the claim set forth in Mrs. Formby's amended complaint, that is, the alleged failure to recall Mrs. Formby. The Bank contended that the failure to recall a terminated employee constituted a separate and distinct claim under the ADEA and that the failure of Mrs. Formby to timely file a separate charge with the E.E.O.C. as to the "failure to recall" claim precluded her from bringing an action on that claim or amending her

previously filed action to add such a claim. The Bank's motion was denied by order entered December 19, 1986. (App. F).

The case was tried before a jury beginning February 11, 1987. The Bank moved for a directed verdict at the close of Mrs. Formby's case which was denied and again at the close of the case which motion the trial court again denied. (App. D, pp. 50, 110). The jury then rendered a verdict in favor of Mrs. Formby and against the Bank in the amount of $19,400.00 and the district court entered a judgment thereon (App. A).

The Bank filed on February 20, 1987 a "Motion for Entry of Judgment Notwithstanding the Verdict or Alternatively for a Remittitur or a New Trial" which was denied without opinion by order entered March 3, 1987. (App. G). The Bank appealed to the United States Court of Appeals for the Eleventh Circuit which affirmed without opinion. (App. B). The Bank's timely petition for rehearing and rehearing en banc was denied without opinion on December 29, 1987. (App. C).

Reasons The Writ Should Be Granted

(1) The United States Court of Appeals for the Eleventh Circuit has acted in conflict with its own prior decisions and has also sanctioned a decision of the district court which so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.[10]

(2) The United States Court of Appeals for the Eleventh Circuit has rendered a decision in conflict with the decisions of all

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[10] See Questions Presented, 1, 3, 4, 5, 6.

all other federal courts of appeals on the same matter.[11]

(3) The United States Court of Appeals for the Eleventh Circuit has decided an important question in federal law which has not been, but should be, settled by this Court.[12]

The ADEA Does Not Require An Employer To Accord Preferential Treatment To An Employee Within The Protected Age Group Under The ADEA Over Those Not So Protected

The decision of the district court which the Eleventh Circuit allowed to stand without opinion is a decision that the Bank failed to rehire Mrs. Formby despite her seniority over other employees who were rehired because they had greater job capabilities than Mrs. Formby and that the failure to rehire Mrs. Formby instead soley because of her seniority was thus a violation of the ADEA. This case, if allowed to stand, represents the proposition that the ADEA protects employee seniority in the absence of any labor contract and that an employer who violates an employee's unwritten "seniority rights," violates the ADEA. This is so far removed from the purpose of the ADEA, and sets such a dangerous precedent for the misuse of the ADEA, as to require the exercise of the supervisory powers of this Court.

The circuit courts of appeal which have considered the issue of whether an employer is required under the ADEA to accord preference in employment decisions to persons within the protected age group over those not so protected have concluded

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[11] See Questions Presented, 2.

[12] See Questions Presented, 1, 2, 3, 4, 5, 6.

that such preference is not required. *Williams v. General Motors. Corp.*, 656 F. 2d 120 (5th Cir. 1981) *cert. denied*, 455 U.S. 943, 102 S. Ct. 1439, 71 L. Ed. 2 655 (1982); *Stacey v. Allied Stores*, 768 F. 2d 402 (D.C. Cir. 1985); *Parcinski v. The Outlet Company*, 673 F. 2d 34 (2nd Cir. 1981); *Tice v. Lampert Yards, Inc.*, 761 F. 2d 1210 (7th Cir. 1985); *Barnes v. Southwest Forest Industries, Inc.*, 814 F. 2d 607 (11th Cir. 1987); *Stanojev v. Ebasco Services, Inc.*, 643 F. 2d 914 (2nd Cir. 1981).

Mrs. Formby did not question the business decision of the Bank to close the Diane Branch. She did not claim that the decision to close the Diane Branch was prompted by any reasons other than valid economic considerations or that the closing was motivated by age discrimination.[13] In fact, the evidence was so clear on that point that the district court stated in the charge conference that it would not charge the jury on Mrs. Formby's termination claim because there was no evidence that she was terminated for any reason other than the closing of the branch in which she was employed. (App. D, pg. 70). The district court subsequently changed its mind without any further hearing and did charge the jury on the termination claim. (App. D, pp. 125-126).

The essence of Mrs. Formby's case then was that the Bank should have either (1) retained her by providing her a job at one of the Bank's branches that were not closed by "bumping" another employee and giving her preference, or (2) recalled her to a job in preference to recalling other employees who had also been laid off from employment. The issue in this reduction in force, age

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[13] The ADEA does not authorize the courts to judge the wisdom of a corporation's business decisions. *Kehart v. Institute of Gas Technology*, 630 F. 2d 1217 (7th Cir. 1980); *Parcinski v. The Outlet Co.*, 673 F. 2d 34 (2nd Cir. 1982).

discrimination case, then is, does the employer have a duty under the ADEA to make a place for an employee within the protected age group whose job is eliminated by allowing that employee to displace of "bump"[14] another employee?

The circuit courts of appeal have held that "nothing in the ADEA requires that younger employees be fired so that employees in the protected age group can be hired." *Barnes v. Southwest Forest Industries, Inc.*, 814 F. 2d at 610 (11th Cir. 1987). *Tice v. Lampert Yards, Inc., supra; Parcinski v. The Outlet Co., supra; Stanojev v. Ebasco Services, Inc., supra.* Rather, the ADEA requires than an employee's age be treated neutrally, "neither facilitating, nor hindering advancement, demotion, or discharge." *Parcinski v. The Outlet Co.*, 673 F. 2d at 37 (2nd Cir. 1982); *Tice v. Lampert Yards, Inc.*, 761 F. 2d at 1217 (7th Circ. 1985).

The only ground other than her initial termination upon which this case was submitted to the jury was Mrs. Formby's claim of discrimination in the Bank's failure to recall her after her initial termination. Specifically, she complained that two other tellers both under age 40 who were terminated from their positions at the same time as Mrs. Formby were recalled to employment but that she was not. Mrs. Formby *did not claim* that she was *more* qualified than these two employees.

Mrs. Formby's claim, therefore, is that the other two

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[14] This Court held in *Transworld Airlines v. Thurston*, 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985), that if an employer provided some employees the right to "bump" others, it could not deny the "bumping" privilege to other employees because of their age. This Court specifically noted in *Thurston* that the ADEA did not require the employer to grant the transfer or "bumping" privileges, but that if those privileges were granted to some employees, they could not be denied to others because of their age. 469 U.S. at 120-121.

employees being outside the ADEA protected age group, and all having roughly equal qualifications,[15] she should have been recalled *in preference because* she was in the protected age group or had more seniority in terms of years of employment.

Mrs. Formby did not even attempt to rebut the evidence submitted by the Bank as to the legitimate, non-discriminatory reasons for the recall of the other two employees.

This case is in conflict with the decisions of all of the circuit courts, including the Eleventh Circuit, which have decided the issue of whether an employer must accord favorable treatment to an employee who is within the protected age group under the ADEA over those not within the protected age group. For example, in *Barnes v. Southwest Forest Industries, Inc., supra,* the Eleventh Circuit affirmed summary judgment in favor of the employer of six plaintiffs who were discharged as security guards at the defendant's paper mill when defendant terminated its in-house security force and contracted security service to an outside firm. The plaintiffs claimed that the defendant discriminated against them by "failing to retain them in other positions and by failing to rehire them once they had been terminated." 814 F. 2d at 608. This is the *same claim* as is being made by Mrs. Formby here. The Eleventh Circuit noted that the decision of the employer in *Barnes* to close down its in-house security department was prompted by valid economic considerations. Similarly, there is no

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[15] The Bank's president and CEO, Mr. Rutledge, testified that Mss. Davis and Freeman had experience in several departments at the Bank and could therefore act as "floaters" in several jobs at the Bank, but that Mrs. Formby's experience was limited to the teller position.

question here but that the closing of the Diane Branch was prompted by valid economic considerations. The plaintiffs in *Barnes* also complained that the employer had, within three months immediately preceding their discharge, hired twelve employees to work in the main plant, only one of whom was older than 40. The plaintiffs claimed that this was evidence of age discrimination. The Eleventh Circuit Court held that *"nothing in the ADEA requires that younger employees be fired so that employees in the protected age group can be hired."* 814 F. 2d at 610.

A similar case directly in point is *Tice v. Lampert Yards, Inc.*, 761 F. 2d 1210 (7th Cir. 1985). Mr. Tice was 58 years old and worked at a mill shop in Sturgeon Bay for the defendant company. The company claimed the mill shop was a losing financial proposition and informed the plaintiff he was being terminated because the mill shop was being closed. The plaintiff claimed that the mill shop was not losing money, that another employee was doing mill work and the he was not retained to do that mill work because of his age. The circuit court affirmed a judgment against the plaintiff, holding that:

> The underlying thesis of the plaintiff's case appears to be that if the millshop did in fact incur substantial losses and Lampert Yards was justified in shutting it down, then Lampert Yards had an affirmative duty to retain Tice by creating another job or by bumping another employee, presumably Warwick. However, "[t]he ADEA mandates that an employer reach employment decisions without regard to age, but it does not place an affirmative duty upon an employer to accord special treatment to members of the protected age group." *Williams V. General Motors Corp.*, 656 F. 2d 120, 129 (5th Cir.

> 1981). The ADEA was not intended to legislate seniority rights where none exist in the contract of employment. (761 F. 2d at 1217)

To the same effect are *Parcinski v. The Outlet Co.*, 673 F. 2d 34 (2nd Cir. 1982) and *Stanojev v. Ebasco Services, Inc.*, 643 F. 2d 914 (2nd Cir. 1981). ("There was no basis for blaming management with discrimination because it did not create another new position for Stanojev [after his old position was eliminated] in order to continue him on the payroll." 643 F. 2d at 920).

Mrs. Formby's argument here is that she should have been recalled in preference to one of the other tellers because of her age and/or her seniority with the Bank. The verdict in this case, affirmed by the Eleventh Circuit without opinion, sanctions a departure by the district court which is so far from accepted judicial proceedings under the ADEA as to warrant this Court's exercise of its supervisory power by writ of certiorari.

The Burden of Proof Requirements Set Forth In *Texas Department Of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) Should Be Applied In Cases Under The ADEA

This Court in *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) held that in a case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et. seq.*, when a plaintiff has proven a prima facie case of employment discrimination, the defendant bears only the burden of explaining clearly the non-discriminatory reasons for its actions at which point the plaintiff's burden is to prove that these given reasons are pretextual. This Court in *Burdine* reversed the Fifth Circuit's decision which required the employer to *prove*

by a preponderance of the evidence the existence of legitimate non-discriminatory reasons for the employment decision *and* that others hired or promoted were better qualified than plaintiff. This court stated in *Burdine*:

> Title VII, however, does not demand that an employer give preferential treatment to minorities or women. 42 U.S.C. Section 2000e-2(j) [42 USCS Section 2000e(j)]. See *Steelworkers v. Weber*, 443 U.S. 193, 205-206, 51 L. Ed. 2d 480, 99 S. Ct. 2721 (1979). The statute was not intended to "diminish traditional management prerogatives." Id., at 207, 51 L. Ed. 2d 480, 99 S. Ct. 2721. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-578, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978). (450 U.S. at 259).

The Bank contends that the principles set forth in *Burdine* governing the burden of proof between an employer and a plaintiff in a Title VII employment discrimination case should apply equally in a case under the ADEA. The Eleventh Circuit has in fact applied the *Burdine* standards in an age discrimination case, though it refused to do so in this case. *Goldstein v. Manhattan Industries, Inc.*, 758 F. 2d 1435 (11th Cir. 1985). The District of Columbia Circuit Court of Appeals has also applied the *Burdine* burden of proof in an age discrimination case. See *Krodel v. Young*, 748 F. 2d 701 (D.C. 1984); *Coburn v. Pan American World Airways, Inc.*, 711 F. 2d 339 (D.C. Cir. 1983); and *Cuddy v. Carmen*, 694 F. 2d 853 (D.C. Cir. 1982). The Bank's research on this point indicates that all of the federal courts of appeal concur in this holding.

Mrs. Formby *never* made out a prima facie case of age

discrimination. All she proved was that the branch of the Bank in which she worked was closed, her job was eliminated and that she was within the protected age group. Mrs. Formby also failed to prove a prima facie case as to the failure to recall claim because all she proved was that other younger tellers who were laid off at the same time she was terminated were later recalled for employment at the same branch of the Bank where they had previously been employed. Mrs. Formby never contended, much less proved, that she was more qualified than the two other tellers. She only attempted to prove that she was *as* qualified. Mrs. Formby subsequently made no effort at all to rebut or discredit the testimony offered by the Bank as to the reasons for the recall of the other two tellers and the reasons for the failure of the Bank to recall Mrs. Formby to one of those jobs.[16]

The holding in this case contradicts the holding in *Burdine*. If *Burdine* applies to cases under the ADEA, which the Bank contends it should, then this case should be reversed.

A Statement Made By An Officer Of The Employer Who Played No Role In Any Of The Employer's Employment Decisions Is Not Competent Direct Evidence Of Age Discrimination

The evidence which Mrs. Formby claims constitutes direct evidence of age discrimination is a statement made to her by Mr.

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[16] Of course, if the Bank had recalled Mrs. Formby to a position at its Main Branch, it would necessarily have had to deny that position to one of the employees it did recall. If the Bank was not required to "bump" an employee in order to assure Mrs. Formby a job, why should it have a duty not to recall a laid off employee back to the job from which the employee was laid off in order that Mrs. Formby might get that job?

Skates, a vice-president of the Bank, after he informed Mrs. Formby that the Diane Branch was to be closed and her job eliminated. This statement, according to Mrs. Formby, was made by Mr. Skates after he named the other people who were being terminated at the same time as Mrs. Formby. She also testified as to what else Mr. Skates said. According to Mrs. Formby, he said, that "far be it from him to let a young pretty girl go-that was in regards to one that he had told me he was terminating". (App. D, pp. 92; 94) This statement on its face does not constitute evidence of age discrimination because it is no more than a statement by Mr. Skates that *if* it had been up to him, he would not have terminated a pretty young girl who was *in fact* being terminated.

Moreover, the evidence is without contradiction that Mr. Skates played no role whatsoever in making any personnel decisions, including any decisions about Mrs. Formby, and that all personnel decisions were made *exclusively* by Mr. Rutledge. Therefore, Mr. Skates' statement is not competent evidence, either direct or indirect, of age discrimination by the Bank and could not serve as the basis of Mrs. Formby's prima facie case, nor as a basis upon which the district court could properly submit the case to the jury.

The circuit courts of appeal which have considered the question have held that such statements, when made by a person who was not the decision maker, are not competent evidence of age discrimination. *La Montagna v. American Convenience Products, Inc.*, 750 F. 2d 1405 (7th Cir. 1984); *Simmons v. McGuffey Nursing Home, Inc.*, 619 F. 2d 369 (5th Cir. 1980); *White v. Mississippi State Oil and Gas Board*, 650 F. 2d 540 (5th Cir. 1981); *Stendenbach v. CPC Intern, Inc.*, 691 F. 2d 735 (5th Cir. 1982); *Barnes v.*

Southwest Forest Industries, Inc., 814 F. 2d 607 (11th Cir. 1987).

The failure of the district court to grant a directed verdict in favor of the Bank where Mrs. Formby's only claimed direct evidence of age discrimination was Mr. Skates' alleged statement, and the affirmance of that decision by the Eleventh Circuit, is such a departure from accepted judicial proceedings as to require a grant of the writ of certiorari.

The Holding Of The Eleventh Circuit That An EEOC Charge Complaining Only of Termination Of Employment Encompasses A Claim Of Failure To Recall Conflicts With Decisions Of Other Circuit Courts of Appeal

The Bank argued before the district court and the Eleventh Circuit that Mrs. Formby's failure to file a charge with EEOC complaining of the failure to recall her to employment barred her from making a claim in the district court based on failure to recall. The one EEOC charge[17] which plaintiff did file says absolutely nothing about failure to recall. It complains *only* of the *initial termination* on December 14, 1985. In fact, on the section of the EEOC charge form which says "date most recent or continuing discrimination took place" the form says "12-14-84", *the date of Mrs. Formby's initial discharge.* There is no reference on the charge to any complaint about any failure of the Bank to recall Mrs. Formby.

Mrs. Formby had ample opportunity to include a failure to recall charge in her charges against the Bank to the EEOC since the

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[17] Mrs. Formby's EEOC charge is reprinted as Appendix H.

charge was filed after the date on which Mrs. Formby now complains that the other tellers were recalled. Moreover, the charge was filed after Mrs. Formby's confrontation with Mr. Rutledge. Mrs. Formby could have complained of the failure to recall in the charge at the time it was filed on February 8, 1985, she could have filed an amendment to the charge, or she could have filed a second charge. Yet, Mrs. Formby failed to do any of these things.

All of the circuit courts other than the Eleventh have held that an initial termination or layoff is a separate and distinct event from a failure to recall, that a failure to recall is not a "continuing violation" of the discharge, and that each claim is required to be asserted in a charge with the EEOC before suit may be brought on each claim. The Fourth Circuit stated in *Lawson v. Burlington Industries, Inc.* 683 F. 2d 863 863-864 (4th Cir. 1982), cert. denied 459 U.S. 944, 103 S. Ct. 257, 74 L. Ed. 2d 201 (1982):

> Illegal layoff-the charge which appeared in the EEOC notice-does not encompass an allegation of illegal failure to rehire. It is well established that a layoff from employment constitutes a completed act at the time it occurred. *Griffin v. Pacific Maritime Asso.*, 478 F. 2d 1118 (9th Cir.), *cert. denied*, 414 U.S. 859, 94 S. Ct. 69, 38 L. Ed. 2d 109 (1973), and that an employer's failure to recall or rehire does not constitute a continuing violation of the ADEA. Each alleged discriminatory recall constitutes a separate and completed act by the defendant...

To the same effect is *Thomas v. Brown & Root, Inc.*, 745 F. 2d 279 (4th Cir. 1984).

The Seventh Circuit held likewise in *Caldwell v. National Association of Home Builders*, 771 F. 2d 1051 (7th Cir. 1985), stating:

> The hiring decisions in the spring [of 1982] although necessary because of the reorganization and discharges announced the previous fall are independent of the NAHB's decision to terminate Caldwell. An employer's terminating an employee, unlike the employer's failure to hire or to promote, is a completed act; that its consequences linger does not indicate that the discrimination itself is continuing...[Citations omitted]. *Caldwell should have filed two EEOC charges, one in the fall of 1981 and one after the NAHB failed to rehire him.* Even though he waited and consolidated his allegations into one charge, the allegations addressing the NAHB's failure to rehire him are still viable. (Emphasis supplied) (771 F. 2d at 1055-1056).

The Second Circuit in *Miller v. International Telephone and Telegraph Corporation*, 755 F. 2d 20 (2nd Cir. 1985), rejected Mrs. Formby's argument that failure to recall is a continuing violation of the earlier termination and stated:

> This contention must be rejected because no such claim of failure to rehire was made in Miller's [plaintiff's] EEOC complaint. See *Lawson v. Burlington Industries, Inc.*, 683 F. 2d 862, 863-64 (4th Cir.), *cert. denied* 459 201 (1982) (charge of illegal layoff does not encompass failure to rehire; *Reich v. New York Hospital*, 513 F. Supp. 854, 859 (S.D. N.Y. 1981) (refusal to reinstate as separate claim from dismissal). Absent the filing of such claim with the EEOC it could not become the basis of the present action. Moreover, since the claims are separable, the new claim of failure to rehire would not in any event delay the running of the time period as to the earlier claim of discriminatory discharge [citations omitted] ...*There would be no reason for the EEOC to investigate the failure to rehire in connection with the*

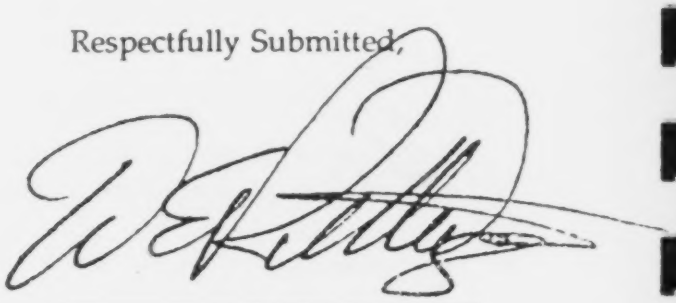
> *claim of allegedly discriminatory discharge unless the former were asserted as part of that claim, which it was not.* The purpose of the notice provision, which is to encourage settlement of discrimination disputes through conciliation and voluntary compliance, would be defeated if a complainant could litigate a claim not previously presented to and investigated by the EEOC. (Emphasis supplied) (755 F. 2d 25-26)

The Eleventh Circuit has chosen in this case to allow Mrs. Formby to pursue failure to recall in the district court which was *never* the basis of a claim asserted before the EEOC. The Second Circuit correctly pointed out in *Miller v. International Telephone and Telegraph Corporation, supra,* that this defeats the purpose of the EEOC administrative proceedings provided for by the Congress as an important and integral part of the ADEA. A writ of certiorari should issue to resolve this conflict among the circuit courts of appeals.

Conclusion

The petition for a writ of certiorari should be granted to resolve the important issues presented by this case.

Respectfully Submitted,

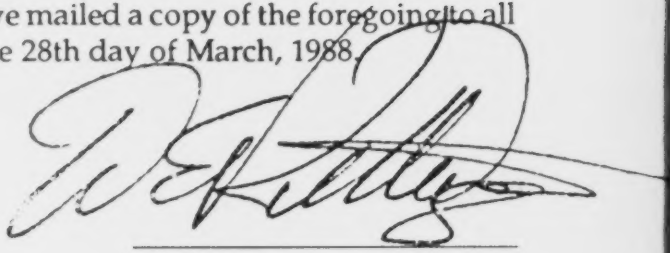


W. Eugene Rutledge

OF COUNSEL:
Rutledge & Kelly, P.c.
1300 Brown Marx Tower
Birmingham, Alabama 35203
Telephone: (205) 322-8761

CERTIFICATE OF SERVICE

I do hereby certify that I have mailed a copy of the foregoing to all counsel of record on this the 28th day of March, 1988.



Of Counsel

APPENDIX

APPENDIX A

JUDGMENT ON JURY VERDICT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Civil Action File No. 85-C-2658-M

SARAH FORMBY,
Plaintiff,

VS

FARMERS AND MERCHANTS BANK

Filed February 12, 1987
United States District Court
Northern District of Alabama
Charles T. Oliver, Clerk

Judgment
ENTERED
February 12, 1987

CLERK'S COURT MINUTES

This action came on for trial on February 9, 1987 before the Court and a jury, Honorable U. W. Clemon, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED and ADJUDGED that the plaintiff Sarah Formby have and recover of the defendant Farmers and Merchants Bank the sum of $19,400.00, in accordance with verdict of the jury this day filed as follows:

"We the jury, find in favor of the plaintiff Sarah Formby and against the defendant Farmers and Merchants Bank and award damages at $19,400.00;" and taxing costs against the defendant

It is further ORDERED that the defendant pay direct to the attorneys of record for the plaintiff the proceeds of the judgment and costs recovered herein by the plaintiff, and that upon receipt thereof, the attorneys of record for the plaintiff will satisfy said

judgment on the records of this court.

DATED: February 11, 1987

Gadsden, Alabama

Court Reporter: Penny Enoch

CHARLES T. OLIVER,
CLERK
By:
S/David Smitherman
Deputy Clerk

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7193

D. C. Docket No. 85-2658

SARAH FORMBY,

Plaintiff-Appellee,

versus

FARMERS AND MERCHANTS BANK,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Alabama

(October 15, 1987)

Before RONEY, Chief Judge, TJOFLAT, Circuit Judge, and PAUL*, District Judge.

PER CURIAM: AFFIRMED. *See* Rule 36-1.

*Honorable M. M. Paul, U. S. District
Judge for the Northern District of Florida
sitting by designation.

"Costs taxed against defendant-appellant."

Judgment Entered: October 15, 1987
For the Court: Miguel J. Cortez, Clerk
By: _____
S/David Maland, Deputy Clerk

ISSUED AS MANDATE: January 12, 1988

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-7193

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 29 1987
MIGUEL J. CORTEZ
CLERK

SARAH FORMBY,

Plaintiff-Appellee,

versus

FARMERS AND MERCHANTS BANK,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF
REHEARING IN BANC

(Opinion October 15, 1987, 11 Cir., 198__, ___F.2d___).
(December 29, 1987)

Before RONEY, Chief Judge, TJOFLAT, Circuit Judge, and PAUL*
District Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of ths panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

S/Paul H. Roney
United States Circuit Judge

*Honorable M. M. Paul, U.S. District Judge
for the Northern District of Florida, sitting by designation.

APPENDIX D

IN THE DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

SARAH FORMBY,	)	CV-85-C-2658-M
	)	
PLAINTIFF,	)	GADSDEN, ALABAMA
	)	
VS.	)	FEBRUARY 11, 1987
	)	
FARMERS AND	)	9:00 A.M.
MERCHANTS	)	
BANK,	)	
	)	
DEFENDANT.	)	
----------	)	

VOLUME I
TRANSCRIPT OF TRIAL
BEFORE HON. U.W. CLEMON, AND A JURY

TRANSCRIPT ORDERED BY: JAMES D. PRUETT

APPEARANCES:

FOR THE PLAINTIFF: HON. CLARENCE F. RHEA
Attorney at Law

930 Forrest Avenue
Gadsden, AL 35901

FOR THE DEFENDANT:

HON. JAMES D. PRUETT
Attorney at Law
P.O. Box 29
Gadsden, AL 35902
-and-
HON. ALBERT L. SHU MAKER
Attorney at Law
270 East Main Street
Centre, AL 35960

COURT REPORTER:

PENNY L. ENOCH
423 Federal Courthouse
Birmingham, AL 35203

INDEX

Witnesses	Direct	Cross	Redirect	Recross
Kelly Day	15	20		
Coleen Ray	22			
Johnny Helms	26			

Witnesses	Direct	Cross	Redirect	Recross
Hazel Myrick	29	33		
W.J. Kennedy	33			
Sandra Sentell	36			
Sarah Formby	40	51		
Annie Ruth Aikens	59	63		
Eugene Rutledge	87	102		
Sarah Formby(recalled)	117			
Court's Oral Charge		146		

PROCEEDINGS

(In open court, jury present.)

THE COURT: Good morning, ladies and gentlemen. We are about to try this case, you heard some of the details of the case during the process of jury selection. Before the trial actually begins, however, there are certain instructions that you are to have so that you are to have so that you will know how to conduct yourself during the trial, and what will be presented to you during the trial.

The plaintiff in this case, Mrs. Sarah Formby, is suing the defendant, Farmers and Merchants Bank, for what she claims to be age discrimination. She says that she was discharged and later not recalled by the bank because of her age. Under a Federal law, the Age Discrimination in Employment Act, it is a violation to discriminate against a person because of his or age, when that person is between the age of forty and seventy.

The plaintiff has the burden of proof of her claim and she must prove each essential element of the claim by what the law calls the preponderance of the evidence. And I'll be telling you more about that when I give you instructions of law at the end of the case. If plaintiff fails to prove each element of her claim, then you must return a verdict for the defendant. If the plaintiff proves each element of her claim, then your verdict will be for the plaintiff.

The case will proceeded in the following order: First, the plaintiff will make, through her counsel, an opening statement of five minutes or less. In her opening statement, she will tell you what she expects the evidence will show.

Following the plaintiff's opening statement, the defendant, through its counsel, will make an opening statement of a similar duration. What is said in opening statements is not evidence in the case. It is an introduction to the evidence.

Following the opening statements, we'll turn to the evidentiary phase of the trial. In this phase, the plaintiff will call witnesses and introduce exhibits in support of her claim. The defendant is not required to produce any evidence, since it does not make any claim in the case. So, the case may end at the end of plaintiff's evidence, if the defendant does not wish to introduce any evidence. If the defendant introduces evidence, then the plaintiff will

have an opportunity at the end of the defendant's evidence to introduce rebuttal evidence, which will then close the evidentiary phase of the trial.

After you have heard the evidence, then you'll hear from the lawyers again. This time by way of closing arguments, or summations. In their closing arguments, the lawyers will tell you what they think the evidence has shown, and what inferences they wish you to draw from the facts as you find them from the evidence. Again, what is said in closing arguments is not evidence in the case.

After you have heard the closing arguments, I will then give you instructions of law, or the charge. In my charge to you, I will tell you what the law is with respect to the claim that you are trying. You are bound to accept the rules of law as I shall give them to you, whether you agree with them or not.

After you have heard my charge, or instructions, you will then retire and consider your verdict. You will base you verdict on the evidence in the case. And in reaching a verdict, deciding what the facts of the case are, you must consider all of the evidence.

In considering all the evidence, you are not required to accept all of the evidence as being true or accurate. You are the only judges of the believability of each witness and the weight to be given to that witness' testimony. In weighing the testimony of a witness, you are to consider the witness' relationship, if any, to the plaintiff or to the defendant; whether the witness has an interest in the outcome of the case; the witness' manner of testifying on the stand; his forthrightness, fairness, intelligence, the extent to which the witness has been supported or contradicted by other evidence. It's your right to accept in whole or in part, the testimony of any

witness.

Now, a witness may be discredited or impeached by contradictory evidence, by showing that the witness has testified falsely concerning an important matter, or by evidence that the witness has done or said something in the past that is inconsistent with the witness' testimony here in court. If you find that a witness has been impeached in either of these ways, then it's your right to give the testimony of that witness such weight, if any, as you think it deserves.

Remember that any statements, objections, or arguments made by the lawyers are not evidence in the case. It's the function of the lawyers to point out those things that are most significant or most helpful to their side of the case. It's also their duty, when they feel that you are about to hear something which the law says you are not entitled to hear, or see something that the law says you shouldn't see, it's their duty to object, and it's my duty to pass on those objections. You should not, therefore, penalize the party because the party's lawyer has made an objection. That's why the lawyer is there, among other things.

And when I sustain an objection, that means that I agree that the evidence should not be heard by you or seen by you. And you shouldn't, then, speculate on what the answer would have been if the witness had been allowed to give an answer, or what the document would have shown, if it had been received in evidence. To the extent that you can, you should try to forget that the question was ever asked, or the document was ever offered in evidence, when the Court sustains an objection to evidence.

During the course of the trial, I will probably be making comments to the lawyers, and I will probably be asking questions

of witnesses on the stand. Do not infer from any statement that I make to the lawyers, or any question that I put to a witness, that I have any feeling as to how this case should be decided. That is your job to decide the facts of the case. Any any question that I ask a witness is only designed to help you in deciding what the true facts are.

Therefore, you shouldn't give any special weight to a question that I ask, or to the witness' answer to that question. To the extent that I comment on the evidence, in instructing the jury or otherwise, you may completely disregard those comments on the evidence, because you are the triers of the facts in this case. You are the judges of the facts. Any my comments have no bearing on your decision as to what the facts are in the case. You are only bound, insofar as the statement I make, to accept my statements of what the law is. Will there be expert testimony?

MR. RHEA: Any expert testimony?

THE COURT: Yes.

MR. RHEA: May it please the Court, the question with respect to the losses and damages will be taken from interrogatories that they have answered. Whether that be considered expert or not, I doubt it.

THE COURT: That would not be expert.

MR. PRUETT: Not from the defendant, your Honor.

THE COURT: You will probably be hearing references to depositions, because the lawyers may use the depositions in an effort to try to impeach the testimony of a witness on the stand to show that in an earlier setting, the witness has said something different from what the witness is saying here on the stand. To the extent that the depositions are used, they may be considered by

you for that purpose only.

A deposition is a statement of a witness taken before a court reporter, after the witness is sworn to tell the truth, and the witness is then asked a series of questions, and the witness answers those questions under oath; and the questions and the answers are later reduced to writing and filed in court as a deposition. And for our purposes here today, those depositions may be used in an effort to show a prior inconsistent statement by a witness.

I take it there will be no deposition read to the jury?

MR. RHEA: Yes, sir, there probably will be a deposition read to the jury.

THE COURT: All right. A deposition may also be used in the place of a witness who would otherwise be here to testify. If a witness is unavailable to testify in person, then that witness' deposition may be read to you, the jury, just as though the witness were here testifying. You will then consider and weigh the deposition testimony of a witness, just as you would consider and weigh the testimony of a witness who actually appeared to testify before you at the trial.

We are going to try to finish this case today. And we'll have a fifteen, twenty-minute recess in the morning and probably take an hour for lunch, and another fifteen, twenty-minute recess in the afternoon.

I will be reminding you throughout the trial that you should not discuss this case among yourselves or with anyone else. You should not allow the case to be discussed in your presence, until such time as you retire to the jury room and begin your consideration of your verdict. You should not decide any issue in the case until that time. So, don't discuss the case and don't decide

until you have retired to the jury room and have begun your deliberations. Those then are the opening instructions of the court. Mr. Rhea.

MR. RHEA: May it please the Court.

THE COURT: Mr. Rhea.

MR. RHEA: Ladies and gentlemen of the jury, I'm Clarence Rhea, as the Judge told you earlier. I represent Mrs. Formby here who is the plaintiff in the case. During the course of the trial, we will have the burden, as the Judge says, of persuading you that our position is correct; that Mrs. Formby was, in fact, discriminated against under the Age Discrimination Act and that this lady who had, we believe the evidence will show, worked approximately ten years, largely as a teller in the Merchants and Farmers Bank in Leesburg and — not Leesburg, but Centre, Alabama — they also have a branch at Leesburg. And we'll show that a younger person who was in Cedar Bluff was allowed to work as a teller. And we'll have certain versions that the Court has already told you about that we will try to bear and bring before you.

I'm sure the parties on both sides hope that you will sit with patience in the inception, the initial stages throughout this case, because it is somewhat tedious if you are not familiar with these matters, and counsel for both sides are simply going to try to show you as best they can what we conceive the facts to be. As the Court has told you, the Court will tell you what the law is. We will try to bring from the witness stand what the facts are.

We believe the evidence will show that Mrs. Formby had worked for a number — may it please the Court, the rule has not been asked for, but I have one person in the courtroom who may become a witness.

THE COURT: All right. Is the rule invoked?

MR. SHUMAKER: Yes, sir.

THE COURT: I'll look to counsel to enforce the rule. All persons who expect to testify, other than the parties and the representative of the bank, will remain outside the courtroom.

MR. RHEA: We believe the evidence will show that Mrs. Formby had worked approximately ten years for the Merchants and Farmers Bank in its — some in its main office in Centre — and some in what's called the Diane Branch.

The Diane Branch was also located in a portion of Centre, Alabama, and is named for a former president, the daughter of the former president as the evidence will show, of the bank, called Diane.

In any event, she performed functions there in a branch, we believe the evidence will show, required her to perform many functions — not only at times as the manager of the branch — of the bookkeeping, bookkeeper; some loan functions; all the type of functions that are required to be done. We believe the evidence will show that she performed them capably and that she was able to perform any of the functions that were there.

Subsequently, a new building was built. A new bank building was built, and the Diane Branch later was abolished, and she was terminated. We believe the evidence will show that she should not have been terminated, that there was no reason for Sarah Formby to be let go. And that the express stated reason by the defendant is a mere pretext. And that will be your determination, as to whether that is a pretext; and whether, in fact, this lady was let go for reasons of age.

We believe the evidence is going to tell you, show you,

however, that she also suffered great losses. As she's sixty years of age or older, and that she is in a protected group, as the Court has indicated to you. And he'll tell you that that protected group, we believe the evidence will be, from age forty — at that time through seventy — I believe now it can be even in excess of seventy. But, she was in a protected group, and that she had worked capably in her job — one of the things that we will want to show you — and she was qualified to perform work in other jobs that remained. And that there were jobs that she could have done.

We believe the evidence is also going to show you that the individual who became the owner of this bank, or the majority stockholder of this bank, very shortly before she was terminated, is a full-time lawyer in Birmingham, Alabama, and a very capable lawyer. And in any event, he made a decision, we believe the evidence will show you, that he didn't want Mrs. Formby there because he didn't' like her as a result of what he said was an encounter with her sometime after he said her job was abolished.

THE CLERK: Time.

MR. RHEA: Is that the time?

THE COURT: Thank you, Mr. Rhea.

MR. RHEA: Thank you, Judge.

THE COURT: Mr. Pruett.

MR. PRUETT: May it please the Court.

THE COURT: Mr. Pruett.

MR. PRUETT: It may help, ladies and gentlemen, if I say just a bit more about what really are two distinct elements of this case. I don't know whether any of you is from this section of Alabama and is familiar with Centre. Let me tell you that Centre is a fairly small town, and it's between here and Rome. It's on 411,

going to Rome. There's two banks there: The Farmers and Merchants Bank is the bank that is the defendant in this case, is the one that Mr. Shumaker and I represent.

In late 1984, for business reasons, having to do with the bank's economic condition; some severe losses and its own situation, the Board of Directors resolved to close a branch. And the Diane Branch, as Mr. Rhea mentioned to you, is a branch that was located half a mile from the main bank. Originally, it was constructed for the purpose of being principally a drive-up branch, where you could bring your car up there and bank there. Because the old Farmers and Merchants Bank building in Centre, the one prior to the one that they operate in now, was located in a place in the town where you couldn't get a car in. It was right on the edge of the highway from Leesburg that runs into 411 right there in the town square, town of Centre.

After the bank built the new building, or when it built the new building, it built a large — it built adequate drive-in facilities, and really didn't need the Diane Branch anymore. At least it didn't, according to the management of the bank in 1984. It had been kept open, actually because of the sentimental connection that Mr. Rhea mentioned, it was named for the deceased daughter of the lady who had been president for a number of years, but was no longer president of the bank in December of 1984. So, that branch was closed.

Now, when it was closed, at the same time within the bank itself, within the whole bank, there were branches at that time at Diane, Leesburg and Cedar Bluff. There was also a shortening — retrenchment in employment. In other words, the bank was not expanding, it was cutting back. It was reducing staff. These two

events coincided. They occurred for the same reason, but they are not connected.

The branch would not have been needed in any event, because the facility that the branch was constructed to provide was already present in the main branch, which is just up the hill. You can see it. You can see one from the other, if you walk out on the road.

Well, Mrs. Formby was the teller. There were two people at the Diane Branch, and she was the teller there. And when her job — her job was abolished. There was no longer a job for her. And there were not vacancies in the main bank, because other people were being let go at the same time. The manager of that branch, being a management employee, was transferred to another job. But, she was a management employee, and there were reasons for that.

Now, forty-three days later, forty-three days after Mrs. Formby was terminated, she came to the stockholders' meeting, the annual stockholders' meeting of the bank. And after the meeting, in the hall outside the meeting room, while there were others around, she and Mr. Rutledge, who was then the president, had what — Mr. Rhea described it as an encounter, depending on whom you hear, different versions of it — but essentially, she inquired about her job, according to Mr. Rutledge, very insistently and within earshot of other people, and created what he described as a rather unpleasant situation. And she was never recalled to work at the bank. She was not hired again. And there were other who were.

But his testimony will be that after — at that encounter, he said, don't talk about this now. This is not the place for it, come and

see me in my office next week. And she never came by. But that that incident, frankly, gave him the impression that it would be awful bad for the bank if she displayed that kind of temper to customers, and he did not feel like she was the kind of person that he needed to have in the bank.

Now, the issue before you —

THE CLERK: Time.

MR. PRUETT: Thank you.

MR. RHEA: Do I have a brief response?

THE COURT: No sir. Plaintiff will call their first witness.

KELLY DAY, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. RHEA:

Q: Mrs. Day, where do you live?

A: I live on Route 2, Cedar Bluff.

Q: And what do you do?

A: I'm unemployed at the time.

Q. Have you ever been employed by the Farmers and Merchants Bank in Centre?

A: Yes, sir, I was.

Q: And when was that?

A: From 1966 until December of '84.

Q: Until December of '84.

A: Yes, sir.

Q: All right. And what were your duties there?

A: Well, I was a teller; I worked in the loan department. I made loans for awhile, I was Branch Manager when I quit.

Q: Did you know Mrs. Sarah Formby when you were there?

A: Yes, sir.

Q: Did you know her during much of the years that she worked there?

A: All the time that she worked there; yes, sir. Sure did.

Q: All right. Do you recall where you observed her in her employment and whether you worked with her from time to time in employment.

A: Well, I was at one branch most of the time, and she was at the other branch.

Q: What branch were you?

A: Leesburg.

Q: What branches did the bank have?

A: We had three branches: We had two for awhile, then we had another one over at Cedar Bluff.

Q: All right. Was there one known as Diane?

A: Yes, sir, there was.

Q: And one where you worked, Leesburg?

A: Leesburg Branch.

Q: And I believe you said there was a Cedar Bluff Branch?

A: Cedar Bluff Branch.

Q: With respect to the job of teller, is that your understanding of the job also Mrs. Formby had most of the time?

A: Yes, sir.

Q: Tell us something about the duties of a teller with respect to the relationship to customers and so forth.

A: Well, first of all, we were always told to tell everybody to come

in, you know, as they opened the door and come in. And, when we took deposits, cashed checks, sold money orders, cashier's checks, traveler's checks, took loan deposits — loan payments; just regular teller duties.

Q: Were those the duties, largely the duties that were accomplished at the branches of the bank?

A: Yes, sir.

Q: And these were the normal and customary duties of the teller?

A: Yes, sir.

Q: Did you call them receiving and paying tellers?

A: Yes, sir.

Q: And was that your job and Sarah's job, also?

A: Yes, sir.

Q: Mrs. Formby? Mrs. Day, with respect to the work that was done at the banks and at the bank, and with regard to getting along well with people, give us your opinion concerning Mrs. Formby, please.

A: Well, I worked several times with Sarah at the Diane Branch filling in, we occasionally get to swap out just a little bit, and I have worked with Sarah for a short period of time and I couldn't have asked to work with anybody any better. She knew her job and she was very efficient.

Q: Now, you recall an occasion when the new bank was built and when she returned for several months to the new bank to assist there —

A: Yes, sir.

Q: — for any employees and so forth?

A: She worked at the drive-in, because she was, I guess, most familiar with the drive-in. Because that was — we had not had a

drive-in at the main offices until the new building.

Q: And you were still working at the time that she was recalled there to the main bank for that purpose?

A: Yes, sir.

Q: All right.

Q: Do you know her age or approximate age?

A: I'm not sure. I would say she's around sixty, but I'm not sure. I never have asked her.

Q: All right. With regard to the Cedar Bluff Branch, although you're not working there, are you aware of the fact that the Cedar Bluff does still have a branch?

A: Yes, sir. They do.

Q: And are you aware of the fact that it has a manager there and also a teller?

A: Yes, sir.

Q: And, do you — do you know who the teller is?

A: Yes, sir, I believe I do.

Q: All right.

A: Unless they have moved her.

Q: Would you tell us whether the teller — approximately what age she is, if you know?

A: She's probably in her late thirties, early forties.

Q: All right. Do you recall a teller named Linda Davis and Karen Freeman?

A: Yes, sir.

Q: Do you know where they worked?

A: They worked at the main bank.

Q: Now, with respect to them being either younger or older than Mrs. Formby, can you tell me whether they were younger or older?

A: They were younger.

Q: And do you have a judgment with respect to their age?

A: Yes, sir. They are in their early twenties.

Q: Early twenties.

A: Yes, sir.

Q: With regard to the termination of Mrs. Formby in December of '84 — you recall the time; don't you?

A: Yes, sir.

Q: Do you recall whether Linda Davis was, in fact, brought — terminated and brought back?

A: Yes, sir.

Q: Or laid off and then recalled?

A: Yes, sir, she was.

Q: And she was in her early twenties, in your judgment?

A: Yes, sir.

Q: And with regard to Carol Freeman, another teller, do you recall whether she was laid off for a short period?

A: Yes, sir.

Q: And called back?

A: Yes, sir.

Q: At the time that Linda Davis and Karen Freeman, these younger tellers in their early twenties were called back, do you know whether, in fact, Sarah Formby was still laid off or terminated from her job at the Diane Branch.

A: She was.

Q: With regard to the capability of Mrs. Formby to accomplish the duties of the teller, will you now tell the Court whether in your option she was capable of accomplishing all the duties of a paying and receiving teller.

MR. PRUETT: Your Honor, I object. That's not an issue in the case. We concede that she was a capable teller.

THE COURT: All right.

MR. RHEA: I don't insist on it. Your witness.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. PRUETT:

Q: Mrs. Day, who replaced you when you left your position at Leesburg?

A: Coleen Ray.

Q: And she had previously been the manager at the Diane Branch?

A: Right.

Q: She came to be the manager from Leesburg from manager at Diane?

A: That's right.

Q: Linda Davis is actually about thirty-six; isn't she?

A: I don't know her age. She looks young to me.

Q: One of the fortunate ones of us?

A: Yes.

Q: All right. She was called back to me job she had held when she was originally laid off; was she not?

A: I think she went back as teller, I'm not sure about that.

Q: Is not that also the case with Mrs. Freeman?

A: I think so.

Q: They both — in other words, they were terminated and then they were brought back to the same jobs they had occupied before?

A: Now, I don't know about Karen. I think she went back to bookkeeping.

Q: Hadn't she been in bookkeeping before?

A. Yes, but she had been moved out as a teller.

Q. But they were both at the main branch?

A. Yes, sir.

MR. PRUETT: That's all. Thank you, ma'am.

MR. RHEA: Thank you. May she be excused?

THE COURT: Yes, she may be excuse. Plaintiff will call her next witness.

(Witness excused.)

COLEEN RAY, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. RHEA:

Q: Mrs. Ray, you and I spell our names a little different, bankers all seem to spell their name with a R-A-Y fortunately for us lawyers. You are now employed where?

A: At Farmers and Merchants Bank, Cedar Bluff Branch.

Q: How long have you been at the Cedar Bluff Branch?

A: I don't really know. About a year and a half, I guess. I'm not sure.

Q: Did you go there promptly — were you formerly at the Diane Branch?

A: Yes, I was.

Q: Did you go from the Diane Branch to the Cedar Bluff Branch?

A: No, I went to Leesburg.

Q: All right. So, you've worked at all of the branches then; is that correct?

A: Yes, that's right.

Q: When you were at the Diane Branch, did you have as one of the tellers working for you, Sarah Formby?

A: Yes.

Q: Mrs. Formby here? And do you recall what period of time she

worked under your supervision?

A: It was while — it was all the time that I was at the Diane Branch.

Q: Do you recollect —

A: I don't remember dates, I'm sorry.

Q: All right. Was it a number of years?

A: Yes.

Q: All right. During that time, did you from time to time go on a vacation or off for a day or two?

A: Yes. And I — let me correct something — I worked — she worked with me while she was at the Diane Branch, but there was a period she was not at the branch.

Q: All right. During that period that she was not at the branch, do you remember if she had been recalled to the main bank?

A: Yes.

Q: And to assist them there?

A: Uh-huh. That's right.

Q: And do you recall — yes — do you recall if that was shortly after the main bank had been expanded and built the new building?

A: Yes.

Q: All right. Do you recall whether she stayed over there for several months?

A: Yes. She did.

Q: And then returned to the Diane Branch?

A: Yes.

Q: Did you feel comfortable giving her work to do at the Diane Branch?

A: Yes.

Q: Worked well together?

A: Yes.

Q: With regard to the work of a paying and receiving teller, did she perform all her duties, as far as you know, of paying and receiving teller?

MR. PRUETT: Your Honor —

THE COURT: The objection is sustained.

Q: Mrs. Ray, there were — do you recall other younger tellers that were younger than Mrs. Formby that were terminated or laid off and then recalled.

A: They wasn't down there.

Q: How about Linda Davis; do you remember her?

A: Linda Davis? Yes.

Q: Did you know her?

A: Yes, I know her.

Q: Do you remember about what her age was?

A: I don't know.

Q: Fairly young?

A: She has got a graduate daughter, so I figure she has to be, you know, have to be pretty old by that.

Q: I see. You don't know her age?

A: No. I've never asked her.

Q: Karen Freeman, do you know he?

A: Yes, I do.

Q: How old is she?

A: I don't know, I've never asked her either.

Q: Is she young?

A: She's pretty young. I don't know.

Q: Do you know —

A: I'm not good with ages.

Q: — do you know that they are still working for the bank?

A: Which —

Q: Do you know if they are still working for the bank?

A: Yes.

Q: All right. You know that they are younger than Mrs. Formby?

A: Yes, I guess. I don't know.

Q: Do you have a judgment of what the age of Mrs. Formby is?

A: Yes.

Q: What is that?

A: Well, she's a little older than I am.

Q: Give us your estimate of her age.

A: Well, she's about fifty-eight.

MR. RHEA: Okay. Thank you.

THE WITNESS: She stayed thirty-nine for several years, I know.

MR. RHEA: Very good. That's all. Thank you very much.

THE COURT: Cross-examination.

MR. PRUETT: No questions.

THE COURT: Plaintiff will call their next witness.

JOHNNY HELMS, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. RHEA:

Q: Mr. Helms, where are you employed?

A: Farmers and Merchants Bank; Centre, Alabama.

Q: How long have you been employed there?

A: Since April of 1979.

Q: What are your duties?

A: Well, now I'm Vice-President and Branch Manager of the Leesburg Branch in Leesburg, Alabama.

Q: What other duties have you held?

A: Well, I have been teller and been general bookkeeper, and I was auditor; and then I became the Branch Manager. I worked all the areas of the bank.

Q: All right. Mr. Helms, how long have you been with the bank?

A: Since April of '79. Be eight years this April.

Q: During that time, then, you have held several different positions.

A: Yes, sir.

Q: In your capacity as an employee of Farmers and Merchants Bank at Centre, have you had occasion to work with Mrs. Formby from time to time.

A: Well, when I was auditor, I audited her window, you know, once a month.

Q: All right. And did you have — come in fairly close contact with her?

A: Yes, sir.

Q: And with regard to your contact, with what frequency were you there?

A: About once a month. I tried to audit the tellers every month.

Q: Was this true of the other branches also?

A: Yes, sir.

Q: In connection with this, did you come to know most of the employees there at the bank?

A: Yes, sir.

Q: From the layoff in December of '84, do you remember when Mrs. Formby was laid off or terminated in December of '84?

A: Yes, sir.

Q: Do you recall whether following that there were younger employees that were also terminated?

A: Yes, sir.

Q: And, you recall that younger employees were recalled?

A: Well, there was some young — yes, sir, I think so.

Q: And, with regard to Mrs. Formby, did you have occasion to be working at the main branch when it was opened in the new building?

A: No, sir. I came to work after the new building was open.

Q: New building was open sometime prior to '79.

A: Yes, sir.

Q: Was it a fairly new operation, though, when you came there?

A: Well, I think it had been there about two years, I believe.

Q: Do you recall whether you worked there when Mrs. Formby had been recalled to the new building there and worked there awhile?

A: No, sir.

MR. RHEA: Your witness.

MR. PRUETT: No questions, your Honor.

THE COURT: All right. Plaintiff will call their next witness.

MR. RHEA: All right, sir. May these witnesses be excused unless otherwise requested?

THE COURT: Yes, sir.

MR. RHEA: All right, sir.

(Witness excused.)

HAZEL MYRICK, PLAINTIFF'S WITNESS, SWORN

THE COURT: Mr. Rhea, what will be the upshot of this witness' testimony?

DIRECT EXAMINATION

BY MR. RHEA:

Q. Mrs. Myrick, you have worked at the —

THE COURT: Mr. Rhea, I asked you a question.

MR. RHEA: I'm sorry, I didn't hear you.

THE COURT: What will be the upshot of this witness' testimony? Do you want to take it up at the bench?

MR. RHEA: Yes.

(Bench conference on the record.)

MR. RHEA: Please the Court, we have witnesses who will testify to her unusual close relationship and good relationship with customers and so forth. One of their defenses is by the testimony of the present executive and Chairman of the Board who said he never saw this lady but once, and to the effect that she couldn't get along with people, and that he wouldn't under any circumstances reemploy her. We say it's a fatal pretext, may it please the Court.

THE COURT: In other words, this witness is going to testify about the plaintiff's relationships with customers?

MR. RHEA: Generally, that's right. And, of course, her qualifications on the job, too.

THE COURT: Qualifications?

MR. RHEA: Well, just to show her backgrounds and knowledge.

THE COURT: But qualifications is not an issue.

MR. RHEA: No. I think we'll show the background of how long she was on the job and her capacity —

MR. PRUETT: If your Honor please, on the one point, as I understand the case, a subjective reason is an unimpeachable reason if it's honest held. It's not a matter of whether she objected

or not, if the events occurred that created a legitimate subject or impression, then you can't find a claim for age discrimination based on that.

THE COURT: Well, there's going to have to be some evidence, and of course, we are just at the beginning of the case. But the plaintiff is going to have to introduce some evidence that would support an inference that age had something to do with the decision. You might recall her.

MR. RHEA: That's correct, Judge. I think we understand the burden, and I understand where Jim is coming from. I think the man who says he takes all the responsibility in this case, we believe we have got to show such inconsistencies that it is a pure pretext.

THE COURT: How many more witnesses are you going to call to show the plaintiff's relationship with customers?

MR. RHEA: Whenever you will give me about — if you are going to take a ten-minute break, I can rearrange and knock off a couple. I really don't want to terminate anyone without talking to her on each one of them.

THE COURT: How many do you have?

MR. RHEA: I have five more.

THE COURT: It's awfully cumulative.

MR. RHEA: One of them is the plaintiff; that's four.

THE COURT: All right. Well, let's get right down to the issue with each of these.

(In open court.)

BY MR. RHEA:

Q: I may have started to ask you this, but I don't think I completed my question: How long did you work at Merchants — Farmers and Merchants Bank?

A: About thirteen years.

Q: Thirteen years?

A: Yes.

Q: When did you last work for them?

A: In —

Q: Are you still working for them?

A: No. I have been retired five years.

Q: All right. When you worked for them, did you work for a number of years closely with Mrs. Formby?

A: Around eight years. She started —

Q: Ma'am?

A: Eight years.

Q: With her?

A: Yes.

Q: And is that on pretty much of a daily basis?

A: Yes, it is.

Q: Would you tell us, if you will, her relationship to customers.

A: She had a very good relationship with the customers. Everybody seemed to like Sarah.

:Q: With regard to customers insisting on being waited on by a particular person, did she have those customers that insisted on her?

A: Yes, she did. We all had our special customers.

Q: And was she then, during this eight years that you were there, would you say that her relationship was outstanding with the customers?

A: I thought so.

MR. RHEA: Thank you, that's all I have.

THE COURT: Cross-examination.

MR. PRUETT: I have one question, your Honor.

CROSS-EXAMINATION

BY MR. PRUETT:

Q: As I understand, Mrs. Myrick, you retired about 1982?

A: Yes, sir.

Q: You haven't been connected with the bank since?

A: No. I retired in '82.

MR. PRUETT: That's all I have. Thank you.

THE COURT: Thank you, ma'am. Plaintiff call their next witness.

(Witness excused.)

MR. RHEA: W.J. Kennedy, please

WILLIAM J. KENNEDY, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. RHEA:

Q: Mr. Kennedy, over here, I'll be asking you some questions. Mr. Kennedy, where do you live?

A: Centre, Alabama.

Q: And, what is your relationship with Farmers and Merchants Bank?

A: Stockholder and director.

Q: And, how long have you been a stockholder and director?

A: Director in '83 — since '83; and stockholder, several more years. I don't remember how long.

Q: And what's your primary business?

A: Insurance.

Q: In connection with your work in Centre, have you come to

know Sarah Formby?

A: Yes.

Q: And over what number of years have you known her?

A: Well, I guess Sarah and I have known each other for thirty — probably thirty-seven years.

Q: You mind telling us your age?

A: Sixty-three.

Q: All right, sir.

Q: Do you know something in the neighborhood of what Sarah's age —

A: (No audible response from witness.)

Q: Let me ask you this: Do you know her to be —

A: Sarah is about my age, I'll put it that way.

Q: You know her to be about sixty-one years of age?

A: Yes.

Q: All right, sir. And, have you — y'all have been knowing each other, then, for more than thirty years?

A: Yes.

Q: In that connection, have you also known her as an employee of the bank?

A: Yes.

Q: And did you know her during the nine years that she worked for Farmers and Merchants Bank?

A: Yes.

Q: Did you know her during the eight years or so she was a paying and receiving teller, largely at the Diane Branch?

A: Yes.

Q: Did you know her also during the time she was brought back to the new bank and helped with setting up the new bank and its

operations there for approximately a year?

A: The new bank — I don't follow you.

Q: The new bank building, when you moved into the new building, when she came back there to help out there for awhile. Do you recall — did you know her during those years, too?

A: I didn't know — I didn't know where she worked exactly, different branches. I knew the last time — most of the time, she was down at the drive-in when I would go through there.

Q: All right, sir.

A: I know she has worked at both places.

Q: Now, with regard to your interest in the bank as a stockholder and a director, would you tell us whether — what you understood with regard to Sarah's relationship to the stockholders of the bank — not the stockholders, but the customers of the bank?

A: Well, she was a — she waited on the customers in the teller window at the drive-in bank.

Q: And your opinion with how well she got along with the customers of the bank?

A: I never heard no complaint.

Q: During the years that she worked there and that you were interested in the bank, both as a stockholder and a director, did you ever hear any complaints about her whatsoever?

A: Not that I know of.

MR. RHEA: Your witness.

THE COURT: Cross-examination.

MR. PRUETT: No questions, your Honor.

THE COURT: Plaintiff will call their next witness.

(Witness excused.)

MR. RHEA: Sandra Sentell.

SANDRA SENTELL, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. RHEA:

Q: Mrs. Sentell, is it S-E-N-T-E-L-L?

A: Yes, S-E-N-T-E-L-L.

Q: Where are you — where do you live?

A: Centre.

Q: And what business are you in?

A: I have a beauty shop.

Q: All right. And have you lived in Centre most of your life?

A: Yes, sir, all my life.

Q: Do you know Mrs. Sarah Formby here—

A: Yes, sir.

Q: —seated at the counsel table with me? How long have you known her?

A: As long as I can remember.

Q: Do you also do business at the Farmers and Merchants Bank?

A: Yes, sir.

Q: Do you have a stock interest in the bank?

A: Yes, sir.

Q: Have you served on the Board of Directors?

A: Yes, sir.

Q: And do you currently serve on the Board of Directors of the bank?

A: Yes, sir.

Q: All right. Were you serving on the Board of Directors in 1984-85?

A: Yes, sir.

Q: '84-85, I guess. During the approximately nine years or ten

years that Mrs. Formby worked for the Farmers and Merchants Bank, did you know her during those years?

A: Yes, sir.

Q: And did you—were you occasionally in and out of the bank, or at the Diane Branch where she did work largely?

A: Not the Diane Branch that much. No, sir.

Q: All right. Did you—how large is Centre—how many folks live there?

A: Oh, three thousand.

Q: All right. It's a small town?

A: Small town.

Q: And in the relationship that Sarah had with the bank's customers, would you tell us whether that was a good or a bad relationship that she had?

A: I do not know. With the bank customers?

Q: Yes.

A: I do not know.

Q: Did you ever have any complaints from anybody about her?

A: Not to my knowledge.

Q: All right. As far as you know, she got along well with the customers, then; is that right?

A: As far as I know.

Q: Never knew any different?

A: No, sir.

Q: During all the ten years that she was there, did it ever come to your attention that there was any complaints ever made about her, as far as you know?

A: No, sir.

Q: All right. Mrs. Sentell, did you attend a stockholders' meeting

some month or so after the Diane Branch was closed?

A: Yes, sir.

Q: Did you, at the stockholders' meeting, did you see Mrs. Formby?

A: Yes, sir.

Q: Did you talk to her?

A: No, sir, I did not talk to her.

Q: Did you see her talk to anybody else?

A: No.

Q: Okay. You didn't—y'all just didn't come across each other on that occasion; is that right?

A: No.

Q: All right. Very good.

MR. RHEA: I believe that's all I have.

THE COURT: Cross-examination.

MR. PRUETT: No questions, your Honor.

THE COURT: All right. Thank you. Plaintiff will call their next witness.

(Witness excused).

MR. RHEA: I call Sarah Formby.

SARAH FORMBY, THE PLAINTIFF, SWORN

DIRECT EXAMINATION

BY MR. RHEA:

Q: Mrs. Formby, we've used your name quite a bit, now we'll ask you a couple of questions as to who Sarah Formby is. Tell us where

you live.

A: I live in Centre, Alabama.

Q: And tell us your age.

A: Sixty-one.

Q: And what was your date of birth?

A: June 4, '25.

Q: What is your location in the town there with respect to the location of Farmers and Merchants Bank, where do you live; how far do you live?

A: The main bank or the—

Q: Main bank.

A: Okay. Half a mile, three quarters of a mile.

Q: About—

A: I'm not good on distances, but I'd say three quarters of a mile, or maybe a mile. I'm not sure.

Q: And you are a former employee of Farmers and Merchants Bank?

A: Yes, I am.

Q: When you worked for Farmers and Merchants Bank, do you recall the years that you worked there?

A: Yes, sir.

Q: Tell us what those years were.

A: I went to work in September of 1974 and I worked until December the 14th of 1984.

Q: What were your duties while you were there?

A: I was a teller and a drive-in teller. I waited on customers inside the bank, and also at the drive-in window.

Q: And during the—we have heard some of them tell us about what the teller did with respect to receive deposits, cashing checks,

taking loan payments, things like that--did you also—and was that your duties also?

A: Yes, sir.

Q: Did you have the full scope of the duties there?

A: Yes, sir.

Q: How many people worked in a branch where you worked?

A: At one time, three; and then two, for several years.

Q: Did you work with a manager at the branch at all times?

A: Yes, I did.

Q: From time to time, would the manager be off on vacation or a holiday, or be absent sick, or something of that nature?

A: Yes, sir.

Q: In those occasions, what were your responsibilities?

A: I acted, or carried on the work that a branch manager would; in balancing the vault and seeing that the drawers were balanced and keeping the bank book and bringing money down from the main bank or sending money to the other bank, and doing just the duties that a branch manager would do.

Q: During all of these duties that you performed, was any complaints ever made to you with respect to any complaint against your work?

A: No, sir.

Q: In addition to the several duties of that of paying and receiving teller, or acting as branch manager when the manager was gone, did you sometimes leave the branch and go to the main office to work?

A: Yes, sir. When the new building was built, Mary George—which was then my CEO or president of the bank—asked me to come and work in the drive-in window, because it was new. We

had tubes that people hadn't—had not bee used to using. And she asked me to come up there, because I knew so many people and they wouldn't mind asking me how you worked the tubes and so forth. So, I stayed at the main bank for almost a year in the drive-in; or maybe a little over a year, I'm not sure.

Q: Who was Mary George?

A: Mary George, at the time, was my CEO and President and Chairman of the Board of the bank.

Q: Now, Mrs. Formby, you also have a stock interest in the bank?

A: A small amount.

Q: Very small?

A: Yes, small amount.

Q: But you are a stockholders?

A: Yes, sir.

Q: And were you a stockholder at the time that you were terminated in December of '84?

A: Yes, sir.

Q: And have you continued to be a stockholder—

A: Yes, sir.

Q: —of the bank down to the present time? And you say just a very few shares; is that correct?

A: Yes, sir.

Q: With regard to December '84, you said you were terminated at that time. Tell us if you will, what happened.

A: Just how it happened?

Q: Yes. What did happen?

A: On the morning of December 14th, which was a Friday, I went in to work at the Diane Branch. And my manager, Coleen Ray was leaving out the door. And I asked her where she was going, and

she said she had been transferred to the Leesburg Branch.

I went on in—this is hard for me—and there were two younger girls in our windows. I'm sorry—

Q: There were two younger girls working there; is that correct?

A: Yes.

Q: Had they not been working there—

A: No, sir.

Q: This was something new to you; is that correct;]

A: So, they didn't know what I was supposed to do. So, I called the main bank and asked to speak to my supervisor, which was Lou Nell Ussery, and she was not in yet. So, I asked to speak to Nell Cucomer, and asked her what I was supposed to do. And she said she didn't know, that Mr. Richard Skates would be down and talk to me.

So, I guess it was fifteen minutes before he came to the branch, and took me into the conference room and said they were closing the Diane Branch and I was terminated. I asked at that time if there was not something at the main bank that I might be able to do. And he said that he didn't think they had anything that I'd be interested in.

And he named the other people that were being terminated. He also said that he—far be it from him to let a young pretty girl go—that was in regards to one that he had told me he was terminating. Although she was hired back within the next week. But, I didn't know—I just needed a job. I wanted a job. I love to work at the bank.

Q: Who was Richard Skates, if you will?

A: At that time, he was the Executive Vice-President of the bank.

Q: Now, how close was this to the time that they sent you home?

A: You mean that December the 14th, that morning?

Q: Yes.

A: Within thirty or forty-five minutes, when Mr.—I've never understood how I left without balancing my money. I mean, they gave me no chance to balance my money, you know. And then somebody working in it, I didn't know what might be said or anything, but I didn't have a chance to balance my money or anything. I left immediately. My job was terminated, he said. But the branch stayed open—this was December 14th, now, and the branch—

Q: How long did the branch continue?

A: Stayed open until January the 2nd of 1985.

Q: All right. And then did you continue with your interest in working there or somewhere else?

A: Yes, sir. I asked Mr. Skates once or twice after that if there was anything I might be able to do after I knew that he was hiring back some young girls. But he said, no, he didn't think they had anything I'd be interested in.

Q: Mrs. Formby, you recall asking certain questions of bank officials with regard to your salary and your hospital insurance, and things of that nature; is that correct?

A: Yes, sir.

Q: Would you look at that just a moment. At the time that you were laid off or terminated or abolished or whatever, was—do you know what your earnings were by the month?

A: Yes, sir.

Q: Wages?

A: Yes, sir. Seven hundred dollars.

Q: Seven hundred dollars per month?

A: Yes, sir.

Q: Did you have certain other benefits that you lost as a result of the losing of your job?

A: Yes, sir.

Q: And tell me some of those, please, ma'am.

A: I had hospital insurance at sixty-five eighty-two monthly. Is that what I should say?

Q: Sixty-five dollars and eighty-two cents per month?

A: Uh-huh. Dental insurance, which was nine ninety-six a month.

Q: You'll have to go kind of slow. Dental insurance?

A: Yes, sir.

Q: And that was nine ninety-six per month?

A: Yes, sir.

Q: All right. And did you have other benefits?

A: Yes, sir. Short-term disability of one ninety-five monthly; and long-term disability.

Q: If you will hold just a minute, please ma'am.

A: Okay.

Q: Long-term disability of what?

A: Four eighty a month.

Q: All right.

A: Life insurance, which was six twenty a month.

Q: Six dollars and twenty cents. And do you know what that benefit provided you?

A: Seventeen thousand.

Q: Seventeen thousand dollar benefit?

A: Yes, sir. And then an undetermined amount of profit sharing.

Q: Now, you have, since December of 1984, a lapse of some twenty-seven months, have you sought other employment?

A: Yes, sir.

Q: Would you tell us what efforts you have made to obtain other employment, Mrs. Formby?

A: Well, as I stated, I started with the Farmers and Merchants Bank, and then—

Q: Did you make efforts to go back to Farmers and Merchants Bank?

A: Yes, sir.

Q: Did you reapply there when you heard they were bringing back younger people?

A: Yes, sir.

Q: And with what results? Were you turned down?

A: Yes, sir.

Q: You will recall in opening statement that counsel for the defendant said that his evidence would show that the present President, Chief Executive Officer and Chairman of the Board, had asked you to come by his office to talk about going to work. Did that ever happen?

A: No, sir, he did not ask me. I wanted a job, I would have been there.

Q: Have you not only then sought employment back at the Farmers and Merchants Bank, but sought employment elsewhere.

A: Yes, sir.

Q: And have you kept yourself—

A: Contact.

Q: —trying to get a job?

A: Yes, sir.

Q: Now, tell us again your age.

A: Sixty-one.

Q: At the time you were terminated, you were terminated at—what was your age then?

A: Fifty-nine.

Q: Just, without trying to tell us all, please, tell us some of me efforts you have made to get employment.

A: Well, I applied at Union State Bank.

Q: Where:

A: In Cedar Bluff. Then they built a branch in Centre, and I was even told by that manager that they were looking for younger girls.

MR. SHUMAKER: We're going to object, if the Court please, to that statement and move to strike as being nonresponsive and hearsay.

THE COURT: The objection is sustained.

Q: All right. But you made application at the other bank; is that correct;

A: Yes, sir.

Q: In the town? And, as they would expand to a branch, you would make application; is that correct?

A: Yes, sir.

Q: Now, as Farmers and Merchants where you formerly worked, did it come to your attention that tellers younger than you had been allowed to continue to work?

MR. SHUMAKER: We object to the form of that question, leading.

THE COURT: Objection is sustained.

Q: Do you know Linda Davis?

A: Yes, I do.

Q: Tell us, if you will, where she's employed.

A: At Farmers and Merchants Bank, main bank, in Centre, Alabama.

Q: How old is she?

A: I would say in her thirties. But I have—I'm not sure.

Q: She's younger than you are?

A: Yes, sir.

Q: And has she continued to work there?

A: Yes, sir.

Q: And, Karen Freeman—

A: Yes, sir.

Q: —do you have a judgment of her age?

A: In her twenties.

Q: And are these employees employed as tellers, and were they employed as tellers?

A: I'm not sure about Karen Freeman, but Linda Davis was. And I—I don't know about Karen Freeman.

Q: Okay. During the period of time since December of '84 and you said you seriously needed employment, have you been ready, willing and available to go to work?

A: Yes, sir.

Q: Back to Farmers and Merchants, if allowed?

A: Yes, sir.

MR. RHEA: Approach the bench with me, please.

(Bench conference on the record.)

MR. RHEA: May it please the Court, in the old days we had to prove charges and these sort of things. I think that's covered in the pretrial and we do not have to prove it.

THE COURT: Is there an issue made of the charge?

MR. SHUMAKER: Notice—

MR. PRUETT: We have one in the record, your Honor, which you denied a Motion for Summary Judgment, but other than that, there's not one.

THE COURT: The one you refer to specifically is the defendants take the position that plaintiff is required to file a charge with respect to the failure to recall.

MR. SHUMAKER: That's correct.

THE COURT: And I have held that the earlier charge of discharge was one out of which the failure to recall arose, and therefore, there was no necessity to file a separate charge on the recall issue.

MR. PRUETT: I don't think there's any question about the facts involved.

THE COURT: That's correct.

MR. RHEA: I don't want to clutter the record, but I don't' want to leave any essential element out.

THE COURT: You're covered.

(In open court)

MR. RHEA: I'm going to approach the witness, if I may. That's all I have of this witness, may it please the Court.

THE COURT: Cross-examination.

MR. PRUETT: Just a couple of questions, may it please your Honor.

CROSS-EXAMINATION

BY MR. PRUETT:

Q: Mrs. Formby, the two people who came to the Diane Branch on the 14th of December were Mrs. Chesnut; wasn't she one of them?

A: Yes.

Q: And, Mrs. Petty, Teresa—

A: Teresa Sherbert. I didn't know her married name.

Q: Same lady, Teresa Sherbert Petty?

A: Uh-huh.

Q: And they were both main branch employees; were they not?

A: Yes, sir.

Q: Who just came down for—the branch was kept open only two weeks after that?

A: Two or three, I don't know.

Q: Well, from the 14th of December—

A: 14th to January the 2nd.

Q: —to January the 2nd. You were paid your salary for the two weeks remaining in the year; were you not?

A: I suppose so. I don't—I don't remember, but I probably was. I don't know.

Q: All right. And then on the 2nd, the branch was closed and has never been reopened?

A: No, sir.

Q: You spoke of your profit sharing plan. That was paid to you later; was it not, the part of that you were entitled to?

A: Yes, sir.

Q: And Mr. Skates, the one you spoke with that day, himself was terminated by the bank in September of that year; September of '85, wasn't he?

A: I don't know the exact date, but he was terminated.

Q: Yes, ma'am.

MR. PRUETT: Thank you.

MR. RHEA: We would like to, may it please the Court—

you'll have to sit there just a minute until the Court excuses you—we would like to mark this and be given an opportunity to translate it to the multiples of the month, and then mark it in evidence and offer it as an exhibit.

THE COURT: Were they identified as an exhibit in the list of exhibits you were required to exchange with defendant's counsel under the pretrial order?

MR. RHEA: We referred to the fact that we would have charts, and that's all we referred to. And this is taken from the answer to their Interrogatories—answer they gave to interrogatories.

THE COURT: I understand that.

MR. PRUETT: As I understand it, your Honor, the proposal is simply to do a multiplication of those figures on that piece of paper?

MR. RHEA: Yes.

MR. PRUETT: I have no objection to that, sir.

THE COURT: All right.

MR. RHEA: Shall it be marketed now as an exhibit, or after I do the multiplication? If it would be all right, I would like to do the multiplication and then mark it as an exhibit.

MR. PRUETT: Maybe we better ask the clerk to use a calculator, your Honor, but—

THE COURT: All right. However the parties wish to handle it, in the absence of an objection, it will be received in evidence.

MR. RHEA: Thank you, Judge.

THE COURT: As Plaintiff's Exhibit Number 1.

(Plaintiff's Exhibit 1 received in evidence.)

MR. RHEA: Please the Court, as I have made known to the Court in the off-the-record discussion, I have a witness who I am going to—

THE COURT: Hold on just a moment. Are we finished with the plaintiff?

MR. RHEA: That's all I have of this witness at this time.

THE COURT: Anything?

MR. PRUETT: Yes, I am too.

THE COURT: Thank you, ma'am. You may come down.

MR. RHEA: May it please the Court, I have a deposition here that I understood that I would probably have to use, but under instructions from the Court, will have to see if this person is available today, and I have not checked her today.

THE COURT: Hold on just a moment. Ladies and gentlemen of the jury, let's take our morning recess at this time. We'll be in recess until 10:45 by the clock on the wall. Please do not discuss the case among yourselves or with anyone else, nor allow me case to be discussed in your presence, and we'll see you at 10:45.

(In open court, jury not present.)

THE COURT: Now, Mr. Rhea, there's no need of approaching the bench, because the jury is out. Mr. Rhea, the question is not whether Mrs. Waite can presently be located, the question is whether she's going to come down here and testify live because I have excluded her deposition. There has been no showing that she is unavailable.

MR. RHEA: You are excluding her deposition, Judge?

THE COURT: Yes, sir.

MR. RHEA: All right. I understand. I am surprised, I will say that for the court.

THE COURT: All right. Well—

MR. RHEA: We had made known to the other counsel that we expected to use the deposition. We had done it in the exhibits that we—and I believe they did the same to us—and we just both had made known—these things known to each other. So, I don't know if that's a normal procedure. I had followed what I thought was the normal procedure here.

THE COURT: Well, the normal procedure is that depositions may be read to the jury when a witness is unavailable. A witness is unavailable when she is beyond the territorial limits for service of the subpoena. This witness is within the territorial limits; or when she is sick, and there's no suggestion that this witness is sick, or otherwise incapacitated, and there has been no showing of that whatever.

All that I have heard with respect to the unavailability of this witness is that she called your office and said she wouldn't be available to come down here to testify today because she may be—she might be available the 9th—and that is not, in my view, a sufficient showing of unavailability.

MR. RHEA: May it please the Court, I wasn't thoroughly candid with the Court, I intended to be. I have talked to this witness on three or four occasions, and she is—she travels good bit, she is out of town often. When I called her, she says, I'll be available on the 9th, but I probably won't be available for the two weeks after that.

I said, well, I've got a problem, I need to take your deposition then, if you are not going to be available except the 9th, I understand there may be another case that might be tried. We were able to work out taking a deposition on very short notice, and

we did theirs the same way. We had had this come up, because this matter had been set earlier, and we had the same problem. We—this lady was—

THE COURT: The deposition was taken for use as trial testimony rather than as a discovery deposition?

MR. RHEA: Yes, sir, Judge—well, both. We try to take them for both purposes. But it was trial deposition at that time when she told me she wouldn't be here except the 9th. I mean, she couldn't be assured she would be here but the 9th.

THE COURT: What is the substance of the testimony of this witness?

MR. RHEA: Judge, she employed this lady. She was the Chairman, Chief Executive Office, President of the bank. She took over this bank when her father died in '57, and was there for twenty-eight years as the President of the bank, and she knew this lady very intimately as a good employee. She brought her back to the main bank to perform duties there, outstanding relationship with the customers, as a direct function of her work in opening the new bank and to reassure the customers about a new method they were using, for the customers to use the bank. We thought it would be helpful.

THE COURT: Well, did she have any involvement whatever in the decision, first, to discharge her; and subsequently, not to recall the plaintiff?

MR. RHEA: No, Judge. I can't represent to the Court that she did.

THE COURT: Basically, what she's going to be saying is what the other witnesses have said; and that is, that the plaintiff was a good employee, had no problem relating to the customers.

MR. RHEA: You reduce it to a bare minimum, Judge.

THE COURT: Well, I know. She probably would talk all day if I would allow it. But in terms of the issues in this case, that's what her testimony is going to relate to.

MR. RHEA: Well, it would not deal with the discharge or recall.

THE COURT: All right. Then it's cumulative and so that testimony will not be received. What other evidence would the plaintiff offer?

MR. RHEA: That's the only reason I would have her here, if permitted. That's what I would be reading her deposition.

THE COURT: What other witnesses would the plaintiff call?

MR. RHEA: That is—I have two others that I would call, I just wanted to check and see if they were here. What time are we going to come back?

THE COURT: 10:45.

(In open court, jury not present.)

MR. PRUETT: I would like to move for a directed verdict at the close of the plaintiff's case.

THE COURT: Yes. And it will be overruled.

MR. RHEA: The plaintiff rests.

(In open court, jury present.)

THE COURT: Ladies and gentlemen, the plaintiff has rested. The defendant will call its first witness.

ANNIE RUTH AKINS, DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. SHUMAKER:

Q: Mrs. Akins, where do you live, please, ma'am?

A: I live in Cedar Bluff.

Q: Where are you employed?

A: Farmers and Merchants Bank; Centre, Alabama.

Q: How long have you been employed at the bank, Mrs. Akins?

A: It was ten years last August.

Q: What is your position with the bank?

A: I'm Senior Vice-President and cashier.

Q: Generally, what are your duties in the bank, what are your responsibilities, please, ma'am?

A: In charge of operations, the functions of the general ledger, the bookkeeping, the ongoing daily work; financial statements and all this.

Q: Do you have anything to do with the employees or personnel of the bank?

A: Since becoming Senior Vice-President, I have had input into personnel.

Q: Do you have people working for you or under you within the bank structure?

A: Yes, I do.

Q: And how many people do you generally supervise, Mrs. Akins?

A: We have about twenty, I believe, that is considered in Operations; this includes the two in Leesburg—two employees in Leesburg and the two employees at Cedar Bluff.

Q: Now, when you say Leesburg and Cedar Bluff, you're speaking of the branch offices there?

A: Yes, sir.

Q: And each of those branches has two employees?

A: Yes, they do.

Q: Is one of the employees a manager and one a teller at those two branches?

A: Yes, sir. One is a manager and one is a teller.

Q: Has that generally been the arrangement at those branches since they have been in operation, to your knowledge?

A: To my knowledge, that's the way they have been operating.

Q: Now, Mrs. Akins, how long have you been a Senior Vice-President with the bank?

A: I became Senior Vice-President in April of '86 when the lady who was Operatives officer resigned. I was given that position.

Q: Who was in that position?

A: Mrs. Lou Nell Ussery.

Q: Would Mrs. Ussery have been Mrs. Formby's immediate supervisor?

A: I—yes, I believe so. I think that's correct..

Q: Mrs. Akins, are you aware of the Diane Branch and its location?

A: Yes.

Q: Where is it located with relationship to the main branch—main office building, please, ma'am?

A: Well, it's just down the road. I don't know about how far, about half a mile, I guess.

Q: And is that inside the city limits of the City of Centre?

A: Yes, it is.

Q: Is it on the same street as the main branch?

A: Yes. Same street, same side.

Q: Were you familiar with the operation of that branch in December of 1984?

A: Yes. It was in operation in December of '84.

Q: Do you know how many employees it had at that time?

A: Two.

Q: Who were they?

A: Mrs. Coleen Ray and Sarah Formby.

Q: Now, I believe Mrs. Coleen Ray has previously testified today, that's the same person?

A: Yes, same one.

Q: Of the two, who was the manager of the Diane Branch?

A; Mrs. Ray was manager.

Q: Do you recall when the Diane Branch was closed?

A: It was in December of '84.

Q: At that time—

A: First of '85, I don't remember just exactly.

Q: —At that time, what happened to the employees who were there at the Diane Branch?

A: Mrs. Ray was transferred to Leesburg, and Mrs. Formby was terminated.

Q: Did—what were—what was the job that Mrs. Ray was transferred to?

A: To Manager of the Leesburg Branch.

Q: And what happened to the Manager at the Leesburg Branch?

A: I believe she resigned.

Q: And she took the manager's place at the Leesburg?

A: Yes, she did.

Q: Since the closing of the Diane Branch in December of 1984,

January of 1985, has it been reopened?

A. The Diane Branch?

Q: Yes, ma'am.

A: No, sir.

Q: Now, were there other employees of the bank who were terminated at that time, in addition to Mrs. Formby?

A: Yes.

Q: Do you recall the approximate number of employees?

A: Five or six, I believe.

Q: Were any of those in any of the other branches, if you recall?

A: Yes, I believe that there was one. I believe so.

Q: Were there any employees at the main office terminated?

A: Yes, definitely, from the main office.

Q: Were any of the employees at the main office subsequently recalled?

A: Yes.

Q: What about the other branch employees, were any of them recalled?

A: No, sir.

MR. SHUMAKER: I think that's all. Thank you.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. RHEA:

Q: Mrs. Akins, you said you had known Mrs. Formby for a number of years. I'll ask you, have you known Mrs. Formby a number of

years?

A: I knew Mrs. Formby after I came to work for Farmers and Merchants Bank. Yes.

Q: Where do you live?

A: Cedar Bluff, Alabama.

Q: Okay. Have you lived there most of your life?

A: No, sir. We were there several years ago, some twenty-five, thirty. When my husband was a pastor in the Cedar Bluff area. We left there and went to other areas and came back there when my husband retired.

Q: So, you have only been back how many years?

A: We have been back eleven years.

Q: So, you were there then during the ten years—most of the ten years that Mrs. Formby was employed?

A: I believe Mrs. Formby was there when I went to work. I think so.

Q: All right. With regard to Mrs. Formby's work, as far as you know, was it satisfactory?

A: So far as I know, she was very satisfactory.

Q: And she had been working at the Diane Branch most of the time you were back; wasn't she?

A: Yes, sir.

Q: During the time that she was brought over, and I'm assuming something that I suppose you know, that when she was brought back to the main bank after it was built, do you recall that period of time?

A: Yes, I do.

Q: And during at time, was her work very satisfactory also?

A: At that particular time, I worked on the opposite side of the

bank in the Loan Department.

Q: Okay.

A: But as far as I have any knowledge, her work was satisfactory.

Q: And, Mrs. Akins, during all your period with the bank, as far as you know, there were never any complaints about Mrs. Formby; were there?

A: As far as I have any knowledge. But at that particular time, as I said, I was across the bank in another area and not privileged to that kind of information.

Q: You were opposite in the new bank?

A: I was in the Loan Department. Yes, sir.

Q: You were aware that she was brought back to assist the customers at the new bank?

A: That was the announcement that was made at the personnel meeting, that was the purpose of her going back to the new office.

Q: Very good. With regard to her working at the bank, you certainly had no objection to her continuing to work there, did you?

A: I had none whatsoever.

Q: And she's at the age—assuming she's at the age of sixty-one—she would have another nine years to work there until seventy when she would—

MR. SHUMAKER: We would object to that question.

THE COURT: The objection is sustained. That being a matter not inquired of the witness on direct examination.

MR. RHEA: All right, sir.

Q: Then I'll just put it this way: You know of no reason for her not being—

THE COURT: Mr. Rhea, that question which you are

asking is subject to the same objection.

MR. RHEA: Sure. I withdraw it, and that's all I have.

THE COURT: All right. Redirect.

MR. SHUMAKER: We have no further questions of this witness, Judge.

THE COURT: Alright. Thank you.

(Witness excused.)

THE COURT: Any exhibits?

MR. PRUETT: No, your Honor. The one other problem that I mentioned.

THE COURT: Ladies and gentlemen, there is a final witness for the defendant who is on his way here from Birmingham, and will be here within the hour. We are going to have to recess the proceedings until he can get here. We don't have two jury rooms—the other jury is gone.

If you would, would you retire to the jury room and we'll call you back as soon as the last witness for the defendant arrives.

(In open court, jury not present.)

THE COURT: We are now at the charge conference. I am reviewing the requested charges of the defendant. Beginning at page seventeen, the defendant is requesting charges arising out of the *McDonnell Douglas/Burdine* formulation of the burden of proof and burden of proceeding production in an ADEA case. I don't believe it's appropriate to instruct a jury along these lines. They are the legal standards which the Court must apply; that is to say, if at the end of plaintiff's evidence she has not made out a prima facie case, the case cannot go forward. Or, at least, if she has not adduced substantial evidence of a prima facie case, the case cannot go forward. But that, it seems to me, is a decision which the Court

must make.

MR. PRUETT: Your Honor, I reread that case this morning and I agree. I'm sorry I didn't get those out of there before I handed them up there to you.

THE COURT: Now, looking at the other requested charges, except insofar as they may speak to the *McDonnell Douglas/Burdine* formulation, the charges seem to be in order.

MR. RHEA: Which ones are you referring to, Judge?

THE COURT: The defendant's requested charges.

MR. PRUETT: Your past experience in these matters is such that I have no doubt but your formulation will be every bit as good as ours, and if you will just touch on the points raised by those charges.

THE COURT: I don't feel so sanguine about my own experience, particularly in age cases in the Eleventh Circuit level. I have learned, though, that the Eleventh Circuit prefers that these cases go to the jury, and so I almost always send them.

Now, the other requested charges of the defendant appear to be in order. Requested charges touching on subjective decisions, and the fact that it's not a seniority system, and age being the determining factor, and those kinds of things are in order.

Let's turn briefly to the plaintiff's requested charges. Plaintiff's Requested Charge One would be covered in the charge that will be given. Plaintiff's Requested Charge Two will not be given as requested; instead, I would give the Pattern Jury Instruction Charge, which reads as follows: In order to prevail on her claim, the plaintiff must prove by a preponderance of the evidence: Number one, that she was within the protected age group; that is, between the ages of forty and seventy; number two, that she was

discharged; number three, that her age was one of me determining reasons which prompted the defendant to discharge her. Any objection to that?

MR. RHEA: No, sir, Judge, that is fine.

MR. PRUETT: One of the determining reasons?

THE COURT: One of the determining reasons. On the failure to recall, I propose to charge the jury that the plaintiff must show that she was within the protected age group, that she was qualified to be recalled to another position.

MR. RHEA: All right.

THE COURT: I'm sorry, I shouldn't say to another position.

MR. RHEA: Well—

THE COURT: To another location.

MR. RHEA: Another location or position.

THE COURT: Okay. To another position or location.

MR. RHEA: Either location, because they had tellers that still worked there, and they recall younger tellers.

THE COURT: All right. She must show that she was qualified to be recalled to another location or position.

MR. RHEA: Or the same position at another location.

MR. PRUETT: I think that's implicit.

MR. RHEA: Well, it's a teller—

THE COURT: By the bank—

MR. RHEA: Similar position at another location; maybe that's better than "the same position."

THE COURT: That she was not recalled, and that defendant refused to recall her because of her age, or that the defendant regarded age as a negative factor in the consideration of whether

to recall her. Any objection to that charge?

MR. SHUMAKER: Judge, the fact that it was a negative factor, I think, is a little lighter than what the law provides. I believee it has to be one of the determining factors, does it not, in an age case?

THE COURT: That's the general law, but I took that language from the—

MR. RHEA: Judge, I think—

THE COURT: —the decision quoted by the Alabama Supreme Court—

MR. SHUMAKER: *Greaves* case.

THE COURT: —Eleventh Circuit case. Hold on just a moment, I'll come up with it. It's *Williams versus General Motors*, at pages 29 through 30. That's 656 F. 2d 120. It's quoted in the *Greaves versus Jefferson State Junior College* case, at Page 2548.

MR. PRUETT: Well, I'm searching, I have the *Thornbrough* case which quotes extensively from the *Williams* decision here. May I show you this?

THE COURT: Yes. In the *Thornbrough* case, 760 F. 2d 633 1985, the Circuit at Page 642, characterizes *Williams* as formulating the elements in these terms: One, plaintiff must show that he is within the protected group and that he has been adversely affected by the employer's decision; two, he must show that he was qualified to assume another position at the time of the discharge or demotion—in this case, discharge—and three, produce evidence, circumstantial or direct, from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.

In the next paragraph, on the same page 642, the Court

refers to the literal language of the *Williams* case when it says, "Specifically, the evidence must lead the fact finder reasonably to conclude either one, that defendant consciously refused to consider retaining or relocating plaintiff because of his age; or two, that defendant regarded age as a negative factor in such consideration."

I think that the *Thornbrough* characterization of the *Williams* holding would be more intelligible to the jury, I'm just not sure. I'm open on that. That is to say, that in addition to showing that she was within the protected group; that she has been adversely affected by the discharge decision; that she's qualified to assume another position at the bank; she must also show that the defendant intended to discriminate against her because of her age by failing to recall her.

MR. PRUETT: Seems to be more intelligible, Judge.

THE COURT: What do you think, Mr. Rhea?

MR. RHEA: Judge, I am familiar with the *Williams* case which requires the factor of—and refers to the very term "negative factor", that you first stated. I have no quarrel with that as being proper law.

THE COURT: All right. Well—

MR. RHEA: And one of the factors to be considered. But if it is a negative factor, then it is discriminatory in the context of age discrimination—if age is a—considered a negative factor.

THE COURT: What if it is negative, but it's not determinative, would you say that plaintiff would have carried her burden?

MR. RHEA; No, sir, Judge. I believe that if the plaintiff has shown that age is a negative factor, and that she is otherwise qualified for a position, and was a person even in the protected

group, but younger than this person, that it is a discriminatory act.

THE COURT: Well, I don't think that's so under the *Aikens* case. The plaintiff has the ultimate burden of showing that—the ultimate burden of proving that she was dischargeed and/or not recalled because of her age. That burden never shifts.

MR. RHEA: I agree with that, may it please the Court.

THE COURT: And I think the negative factor language is appropriately addressed to the consideration of whether plaintiff has made out a prima facie case; that is to say, I believe that it is sufficient to show initially that the plaintiff—that age was a negative factor in the decision to discharge and not to recall the plaintiff for purposes of establishing a prima facie case. And so the negative factor would suffice to shift the burden of production, or the burden of going forward, on the defendant. The defendant then would come in and articulate a nondiscriminatory reason for the action. Once that reason is articulated, the plaintiff must show that age was a determinative factor in the discharge. I take it, Mr. Rhea, you disagree with that?

MR. RHEA: Judge, I believe that the way the case, as I understand it, would be interpreted would be that if it's a negative factor on either side of the line, at the prima facie stag or at the—following the defendant's articulation of what we would say was a pretextural—and of course, that's getting into another matter—but if the defendant articulates a consideration that the jury would consider pretextural, then the negative factor is adequate to—

THE COURT: Carry the ultimate burden.

MR. RHEA: —carry the burden, yes.

THE COURT: Yes, I would agree with that.

MR. RHEA: That may be where we are having—

THE COURT: Yes. If the jury finds that the articulated reason is unworthy of credence, than I think that the plaintiff could recover. But again, we are talking in terms of the *McDonnell Douglas/Burdine* formulation of the order—

MR. RHEA: Proof.

THE COURT: —and allocation of proof and persuasion. I don't know whether that is particularly helpful to the jury. What the jury has to understand is that the plaintiff has the ultimate burden of proving that she was discharged and that she was not recalled because of her age.

MR. RHEA: Judge, I agree essentially with what you are saying.

MR. PRUETT: Could I inquire, your Honor, to clarify my own understanding of the Court's feeling of the case to this point?

THE COURT: Yes.

MR. PRUETT: I guess I have to divided it into two—I have tried to divide it in my mind into two parts where maybe it is not so divisible. But, as I understand it, what's happened is, the plaintiff has presented evidence that her original discharge which the defendant asserts was because of the closing of a branch and abolition of her job, that that discharge itself was an act, a discriminatory act, under the ADEA. And that in that instance, there is the direct evidence of the statement made to her by Mr. Skates.

There is another aspect of the case; and that is, that after she and the other people were discharged, some were brought back to work and she was not. I suppose I'm having a little trouble, on that point, with understanding exactly what the plaintiff's proof is that the reason she was not brought back is supported by the evidence we already have in the absence of proof of any system of seniority,

any collective bargaining agreement that requires that people be given consideration, other than just—in other words, the fact that, as I understand it, three other people were brought back to jobs they previously had held—as I remember the evidence, that's what it is—does not seem to me to be sufficient evidence to carry the second aspect of the case forward, unless—unless the one statement made at the time of her initial discharge so far taints the rest of her relationship with the bank that that is what carries it.

THE COURT: Well, I think that the statement was that—something to effect that the Executive Vice-President, Mr. Skates—

MR. PRUETT: —Mr. Skates said that he certainly wouldn't want to get rid of a pretty young thing, or something.

MR. PRUETT: Best I remember, it was something along that. As I remember, he said, you don't think I'm going to fire a pretty young girl, or some such statement as that.

THE COURT: All right. All right. But the pretty young girl was fired?

MR. PRUETT: Yes, sir.

MR. SHUMAKER: Yes, sir, that was the context.

THE COURT: Yes.

MR. PRUETT: I have never seen the other ladies, but I assume they are pretty young ladies.

THE COURT: She was fired, and within a matter of weeks, as I understand it, was recalled.

MR. SHUMAKER: That's correct.

MR. PRUETT: To her old job. Yes, sir.

THE COURT: All right. That, I think, is direct evidence of discriminatory intent; both on the initial—well, perhaps not even

so much on the initial discharge, as it is on the recall aspect of it.

MR. PRUETT: It seems to me that it would--really follows more to the recall than it does the original statement, because the branch was closed. There's no refutation of that, and remains closed.

THE COURT: Well, it really is a failure to recall case; isn't it, Mr. Rhea?

MR. RHEA: Partially that. The—they could have recalled her immediately; they could have recalled her at any time. They have another branch in which they have a teller performing the same duties.

THE COURT: Yes, but what you are seeking here is damages based on their failure to recall.

MR. RHEA: Reinstatement.

THE COURT: It's not really damages based on a discharge, because apparently the discharge was made without regard to age; young and old alike, everybody who worked at that branch was discharged; is that correct?

MR. RHEA: Well, not exactly, because we say that her discharge was tainted with the age factor, which was a negative e factor in her discharge. Now, the branch was abolished, no question about that.

THE COURT: So, regardless as to whether you were one year old or ninety, if you worked in that branch which was closed, as of the time when the branch was closed, you no longer had a job.

MR. RHEA: That's right. Some younger people did.

THE COURT: So, it's not an issue of discharge, because all of them were discharged; the issue in the case is recall.

MR. RHEA: Judge, I suppose recall—young people came

back very promptly—so maybe there's not a lot of time we are talking about. We think that she lost her benefits from the time of the discharge and she should have been retained. She was not called and it was a failure to recall that has continued down to the present time and we go to the age she's seventy.

THE COURT: All right. I have no difficulty—

MR. RHEA: I understand.

THE COURT: —appreciating your argument with respect to the length of back pay.

MR. RHEA: I think may be it would go to this also. One other thing, I think would go to the factor, if we ever get to that point—is whether we are entitled to liquidated damages, I think it would go to that—I think that would go to the factor of liquidated damages, as to at what point it became a, as you say, a discharge and translated over into just purely recall.

As I understand, that's a matter that addresses itself to the Court.

THE COURT: Liquidated damages?

MR. RHEA: Attorney's fees.

THE COURT: Liquidated damages?

MR. PRUETT: I don't think there's any evidence of that, your Honor.

MR. RHEA: Liquidated damages, it's my understanding, and attorney's fees, is addressed to the Court and not to the—not to the jury, if the jury brings in a—finds a verdict, then we have asked also for liquidated damages. And the Court determines the amount—or has in the other cases I have had—the amount of liquidated damages.

THE COURT: Back to the discharge issue. The plaintiff

testified that she was discharged ahead of younger employees by two weeks. She was paid for that period of time, she said somewhat reluctantly. She was paid for that period of time. But the manner of discharge, she says, was a cause of concern.

MR. RHEA: If she had been allowed to work, I assume she would have gotten the severance pay, or the two weeks' vacation or whatever she had earned at a later time. So, she lost the two weeks and wasn't allowed to work. Now, that may be a matter that's not clear.

THE COURT: Well, when I say manner of discharge, what I mean is, she testified that she came in to work on a day certain, and younger tellers were there working, and she was told somewhat unceremoniously that they didn't have anything for her to do, and was left to wonder, at least for some short time, as to what her status was. And perhaps her testimony along that line was not meant to have any particular significance to the Court. Mr. Rhea.

MR. RHEA: Well, the fact that she was left in limbo certainly showed the onus in which they treated her.

THE COURT: I see. That goes to the issues of willfulness, you say?

MR. RHEA: Yes, sir. No question about it.

MR. PRUETT: Well, sir, as I—my recollection is, and she answered on cross-examination what happened—the two younger employees were main branch people sent down temporarily to work the last two weeks closing the branch, who then returned to their jobs at main branch. They did not replace anybody.

THE COURT: I see. Yes.

MR. PRUETT: The people working at Diane Branch were

terminated, given severance pay to the end of the year. The branch was operated until the end of the year by temporary personnel sent down from main office, who then closed it and returned to main office where they still are, I suppose.

THE COURT: All right. On the question of liquidated damages, does the jury decide whether there was a willful violation of the Act, or is that a matter which the Court would decide? And before you answer—

MR. RHEA: It's my—

THE COURT: —I tell you that my approach is that if an employer is aware of the existence of the Age Discrimination in Employment Act, and a jury determines that he violated the Act, then the violation was willful. That's how I would see it. Much as the Courts, I believe, have treated the issue under the Fair Labor Standards Act; that is to say, that if an employer knows of the existence of the Fair Labor Standards and subsequently violates it, the violation is willful, as I understand it.

MR. PRUETT: Is that a subjective or objective standard, your Honor? I mean, are we all, as adult—adult citizens—bound to know the statute, or must there be proof?

THE COURT: I think there has to be proof. I think it has to be proved that the person who made the decision was aware that it's unlawful to discriminate on the basis of age. And that proof, of course, is proof that the plaintiff must make. If the plaintiff doesn't make proof, then there's no evidence of any awareness of the existence of the statute.

MR. PRUETT: I would be astonished, your Honor—mortified, I think—if Mr. Rutledge did not know the existence of the ADEA. In fact, I might find that testimony incredible.

MR. RHEA: Shall we stipulate that at this point?

THE COURT: No. But it it doesn't come was evidence, there's no basis, it seems to me, if the decision is the Court's decision, there's no basis on which to find that there was a willful violation. And proof of that issue must be adduced by the plaintiff.

But, I made these remarks as a prelude to asking you what is your position on whether the jury as to find willfulness or whether the Court has to find? If the jury has to find willfulness, then I have got to, in addition to providing space for the jury to return a verdict for compensatory damages, I have also got to ask the jury whether the violation was willful.

MR. RHEA: You are addressing it to both of us?

THE COURT: Yes.

MR. RHEA: I think the Court makes that determination, my understanding.

MR. PRUETT: Your Honor, I do not know the law on this. I would think that there will be—whatever Mr. Rutledge's answer is—there will be only one piece of evidence on that point, and it will follow whoever makes the decision.

THE COURT: Okay. Is Mr. Rutledgee here?

MR. SHUMAKER: I'll check. I'm sure he'll be in when he gets here.

MR. PRUETT: May I continue: I'm still—I guess I'm not clear in my own mind, your Honor, how you have resolved the question of discharge and recall—whether we are still dealing with two separate instances, or whether this is not really a failure to recall case.

THE COURT: My own view is this is a failure to recall case.

MR. PRUETT: Mine also. I don't know that that helps me,

but it seems to me that's the only thing that it really can be in light of the evidence as it is.

THE COURT: Yes.

MR. RHEA: Of course, we think it's both termination and recall.

THE COURT: Is there any evidence that the closing of the Diane Branch was for anything other than legitimate business reasons?

MR. RHEA: Judge, I don't know of any.

THE COURT: I don't know of any evidence on that—any evidence contrary to that. So, I'm going to treat this case as a failure to recall case over the objection of plaintiff, of course. Plaintiff has an objection and exception to th Court's failure to treat it as a discharge case.

MR. PRUETT: On the question of liquidated damages, your Honor, I don't want to be misunderstood about my earlier agreement, and I don't want to mislead Clarence. But, my understanding was that we were agreeing that he had offered evidence on this paper, I total it seven hundred eighty-eight dollars and seventy-eight cents per month. And that if we figured from the lst of January '85 through today, we are talking about roughly thirteen and a half months of income lost shown.

THE COURT: Well, the issue hasn't been raised, but I think it's seriously open to question as to whether the plaintiff has lost, or is entitled to recover for hospital insurance, dental insurance, short-term disability, long-term disability and life insurance, since we know with respect to the life insurance issue that she hasn't died; that she hasn't suffered a loss. And no evidence that she has been under any disability in the interim; so she hasn't suffered a

loss. There's no evidence that she has had any dental problems or any hospitalization in the interim; so she hasn't suffered a loss with respect to either of those.

Those are items which would not have come to her had she remained in the employ of the company. If she had suffered a loss by way of some hospital bill, dental bill, or disability, then it seems to me that she would be entitled to recover whatever it cost her in terms of being hospitalized or receiving dental treatment or receiving disability payments. And that would probably be much more than the company would have had to pay out in terms of premiums—

MR. PRUETT: Yes, sir.

THE COURT: —for her during that period. Mr. Rhea.

MR. RHEA: I just respectfully disagree with the Court.

THE COURT: Yes, sir.

MR. RHEA: It's my understanding that one of the elements of the benefits that th employee had are those items that we have listed there. The amount of life insurance, the security it gave her family was also the security that was recited by the, as you know, the Congress that the Age Discrimination Act was the most easily violated act of all the acts. And also, the fact that the loss of these things—that they put burdens on society associated with welfare, associated with lack of hospitalization, lack of dental care, lack of pension benefits. This not only doesn't list it, but also she lost seven percent of her pay all this time that would have been contributed by the employer to Social Security benefit. That is certainly a loss that she had. It decreases the amount of pension benefits to which she'll be entitled when she becomes sixty-five.

THE COURT: On that issue, I think that certainly is an item

which she's due to recover. I think that the employer is due to pay to her what it would have paid into the Society Security system on her behalf. She's due to be made whole.

MR. RHEA: Yes, sir. It's my understanding—and Judge, I believe that the fact that she would be covered during that period of time and not now, running to this—this is a lady that could easily have had things to have developed during the two-year period, that had she had hospitalization all the time, may be found six months from now that she cannot buy insurance ever in the future. They don't want to get into those type of catastrophic damages, because this is what we run into—

THE COURT: Hold on just a moment, before you go any further on that. If the jury finds that she is due to be—if the jury finds that th defendant has violated the Act, she's going to be ordered reinstated with all accrued benefits. She's going to pick up the hospitalization insurance and it's going to run just as though she had never been discharged—

MR. RHEA: Judge—

THE COURT: —and not recalled.

MR. RHEA: That will require a separate order of this Court and not a judgment of the jury, because the hospital insurance people will not do that.

THE COURT: A separate order of this Court will be forthcoming. The jury is not going to order her reinstated, the Court is going to order her reinstated.

MR. RHEA: That's correct.

THE COURT: If she wins.

MR. RHEA: Yes, sir, I understand. I understand. Well, what we are pointing out is that it is a great benefit to people, much

more out of proportion at her age and because of aged people than anyone else, when you have these short-term, long-term disabilities, hospital insurance, dental insurance. This is what promotes the loyalty—

THE COURT: Yes. Well, the evidence is in, and I guess I don't know why we are cluttering the record with all this. This is off the record.

(In open court, jury present.)

THE COURT: Ladies and gentlemen, there's no need to sit down. Our witness has come, but it's now time for lunch. We'll be in recess until l o'clock. Do not discuss the case among yourselves or with anyone else, do not allow the case to be discussed in your presence. Keep an open mind. We'll see you at l o'clock. We'll be in recess until 1:00.

Obviously, gentlemen, it will be necessary to have a charge conference—further charge conference.

MR. RHEA: I beg your pardon?

THE COURT: We'll have another charge conference.

(Lunch recess taken at 12:00 until 1:00 P.M.)

AFTERNOON SESSION

(In open court, jury present.)

THE COURT: Defendant will call its next witness.

MR. PRUETT: Mr. Rutledge, your Honor.

WILLIAM EUGENE RUTLEDGE, SR., DEFENDANT'S WITNESS, SWORN

THE WITNESS: 1300 Brown Marx Tower, Birmingham, Alabama

DIRECT EXAMINATION

BY MR. PRUETT:

Q: Mr. Rutledge, you are by profession a lawyer; is that right?

A: That's correct.

Q: And have been a lawyer longer than you have been a banker; is that right?

A: I was admitted to the bar in January of 1963.

Q: How long have you practiced law?

A: Since August 1, 1966. I was in the Army for three and a half years prior to practicing law.

Q: When did you first have an official connection—I mean, a connection other than doing legal work for the Farmers and Merchants Bank of Centre?

A: On October 16, 1984, I applied to the regulatory authorities for permission to acquire control of the bank, and that was granted, and I became a member of the Board of Directors and Chairman of the Executive Committee of the Board of Directors on November 17, 1984.

Q: Had you acquired a majority of the stock?

A: Not — quite at that time. It was almost a majority.

Q: And you since have acquired the majority?

A: That's correct.

Q: What is your present office in the Farmers and Merchants Bank of Centre?

A: I am now Chairman and Chief Executive Officer, but until last Saturday, I was Chairman and President Chief Executive Officer. Mr. Hampton was elected, president last Saturday, so I'm now Chairman and Chief Executive Office.

Q: When you were contemplating your acquisition of the interest in the bank, did you make any examination or study of the bank's condition as it was then?

A: Yes.

Q: Tell the jury, please, sir, in general terms what the bank's financial condition was in October of 1984.

MR. RHEA: We would object, if it please the Court, as not relevant.

THE COURT: Objection is overruled.

A: The bank—there had been an embezzlement from the bank in 1982 which had caused the examining authorities to come into the bank and look at it perhaps more closely than they had in the past. As a result, millions of dollars in loans were written off. The bank lost two million dollars in 1982, one million six hundred thousand—

MR. RHEA: We would object, if it please the Court, as not the best evidence. This man wasn't there until October of '84, by his own admission. We would object.

THE COURT: The objection is sustained.

Q: Just tell us, if you will, what its condition was in October of '84 as you found it.

A: It was under a cease and desist order, which is an order issued by the regulatory authorities, to compel the bank to engage in certain practices that it's not engaging in and cease engaging in certain practices that it is engaging in. And it appeared to me that

it would lose approximately—

MR. RHEA: We object to this, if it please the Court. Again, it's not the best evidence.

THE COURT: I sustain the objection.

Q: Was the bank making money in 1984?

A: No, sir.

Q: Do you know the amount of the loss that it suffered in 1984?

A: Yes.

MR. RHEA: Again object.

THE COURT: Objection is overruled.

Q: How much?

A: Six hundred and thirty thousand dollars was lost in 1984.

Q: When you were examining the condition of the bank, did you formulate any policy to suggest to its Board of Directors for reducing its operating expenses?

A: Yes,sir.

Q: Did any part of that policy relate to the Diane Branch of the bank?

A: Yes, sir.

Q: Tell us, please, sir, what that policy was with respect to the Diane Branch.

MR. RHEA: May it please the Court, again, if this is in writing, that would not be the best evidence.

THE COURT: Objection overruled.

A: The Diane Branch was located about two thousand feet from the main branch on the main road that runs through Centre. It was clear to me that the Diane Branch was not an economically viable unit, since the main office had drive-in windows that could service the same people. So, I immediately made my mind up to try to

close the Diane Branch, even before I bought the stock in the bank.

Q: Did the Board of Directors agree to and resolve to do what you recommended?

MR. RHEA: May it please the Court, again we object Itn's not the best evidence. What somebody else —

THE COURT: Objection overruled.

A: The Board of Directors voted to close the Diane Branch. We made application to the regulatory authorities and they approve it and it was, in fact, closed.

Q: Did any part of your policy or your plan for the bank include other personnel action?

A: Yes.

Q: Tell the jury, please, sir, what other personnel action you recommended to the Board.

A: Well, it was clear to me that if the bank were going to survive, it was going to have to make—

MR. RHEA: Object to the voluntary statement.

THE COURT: Objection is sustained.

A: I determined that I would reduce the number of employees.

Q: Was that policy implemented?

A: Yes, it was.

Q: Were both of those policies implemented at approximately the same time?

A: The closing of the Diane Branch occurred before the announcement of the other reductions—let me rephrase that—the decision to close the Diane Branch occurred before the announcement of the other reductions.

Q: What did you know about the personnel at the Diane Branch at the time this decision to close it was made?

A: Absolutely nothing.

Q: Did you know how many there were there?

A: Yes.

Q: What is your recollection of that?

A: A manager and an employee.

Q: And what was the capacity of the employee?

A: Other than being a general teller.

Q: Teller?

A: My understanding.

Q: Did you know that that was Mrs. Formby?

A: I don't believe I even knew Mrs. Formby's name at that time. I assume you're asking me—

Q: At the time—yes, at the time the decision was made.

A: I don't beiieve I even knew her name at that time. I may have. I'm not clear when I first learned her name.

Q: The branch was closed on the l4th of December, l984. You recollect that to be the date?

A: I don't remember the specific date. That's about correct.

Q: Excuse me, I misstated. It wasn't closed, the personnel there, the permanent personnel there were terminated on that day—are you aware of any of the details of the closing?

A: I believe that it actually—it was about two weeks later that the bank was closed—branch was actually closed.

Q: The testimony is on the 2nd of January, is that—

A: That would be about right.

Q: Now, the personnel, Mrs. Formby and the manager, were told on the l4th, however, that their jobs were being abolished?

A: Yes, sir.

Q: Was there any reason for the difference in the two dates., the

delay of the two weeks before the closing?

MR. RHEA: We object to it as irrelevant.

THE COURT: Objection is overruled.

A: The word is getting about, and I did not want to have the employees working at the bank, for their protection and ours, knowing that their jobs were going to be abolished.

Q: Are you aware that there were also people terminated in the main office?

A: Yes, sir.

Q: Do you know the names of those people?

A: I would if I had a list to look at. I don't just know it in my head.

Q: Let me give you these three names and see if you recognize them: Louis Aldridge, Linda Davis and Karen Freeman?

A: I recognize those names. Yes, sir.

Q: Do you know anything about the three of them or any of the three of them being called back to work after the first of the year?

A: Yes, sir. I made that decision.

Q: Tell us, if you will, please, sir, why Louis Aldridge was called back.

MR. RHEA: We object, if it please the Court.

THE COURT: The objection is overruled.

A: One of the bank branches is the Leesburg Branch, which at that time was situated near the Crumpton Textile Corporation in Leesburg. And Mrs. Aldridge had worked at the Leesburg Branch and had contacts there which I felt would be beneficial for the bank to have back. Although Mrs. Aldridge was told that the job was temporary and could end at any time.

With regard to Karen Freeman, her husband was the manager of the Big E. Grocery Store in Centre, and that was a good

customer and potential customer, and I felt it would be beneficial to the bank to have her back. Plus, Karen had the capacity to be what we call a floater. Which is to say, she could work teller jobs, plus a number of other jobs. And so I made the decision to recall her.

Linda Davis had experience in a number of departments of the bank, and could also move wherever we needed her with the limited employees that I was trying to operate the bank with.

So, those were the reasons that those three people were given temporary employment. And I might say that was stressed to them that it was temporary, because we had to see what was going to happen.

Q: Who was making the decisions about hiring people back at that time?

A: I made every personnel decision after I got there, for the reason that I was very concerned in a small town—

MR. RHEA: May it please the Court, we object to reasons. He said he made the decision.

THE COURT: Objection is sustained.

MR. RHEA: I think that's the response.

Q: What was the reason for your taking personal charge of personnel matters as President of the bank?

MR. RHEA: We object.

A: Well, Centre is a small town—

THE COURT: The objection is overruled.

A: —and I was concerned at my coming into Centre from out of town and being resented, for that reason, as well as having to let people go who were related to other people in Centre. And I felt it would be better that that fall on my head than some of the other

people. I guess, feeling like—more like well, you can expect anything out of him, you know, rather than put that burden on us.

MR. RHEA: Object to editorializing.

THE COURT: Objection is sustained. Mr. Rhea, would you stand when you address the Court? Mr. Rhea.

MR. RHEA: Yes, sir. I apologize to the Court.

THE COURT: All right.

Q: Mr. Rutledge, during that time, when I say that time, I'm referring now to the time between the 14th of December, 1984 and the 26th of January, 1985, you were practicing law in Birmingham; were you not?

A: Part-time; yes, sir.

Q: Were you also spending time at the bank?

A: Yes, sir. Considerable time.

Q: Did you have a regular schedule up there?

A: I tried to maintain being at the bank every Thursday, Friday and Saturday.

Q: Is the bank open on Saturday?

A: Yes, sir.

Q: Is that a day on which business is customarily transacted in Cherokee County?

A: Yes, sir. We have our loan committee meeting every Saturday morning at 7 o'clock.

Q: Did you, while you were there during that period, while you were actually in the bank, speak with people who had—wanted jobs, wanted to be rehired, were interested in personnel matters/

A: Yes, sir.

Q: Did Mrs. Formby ever come to see you during that period?

A: No. First time I ever saw Mrs. Formby, to know that it was Mrs. Formby, I saw was January 26th.

Q: Was that the date of your annual stockholders' meeting?

A: Yes, sir.

Q: Tell the jury, please, sir, what occurred with respect to you and Mrs. Formby on the 26th of January.

A: Well, there was a meeting or episode that took place.

Q: Where did that occur?

A: It took place in the hallway on the second floor of the bank, outside the room where the stockholders' meeting had taken place.

Q: How many people, in your best judgment, attended the stockholders' meeting?

A: I would say around—around a hundred, a hundred and ten.

Q: As the shareholders left the meeting, did they go down the hall where the episode with you and Mrs. Formby took place?

A: Some did.

Q: What was the occasion for your knowing that this was Mrs. Formby?

A: Well, I had left the room very quickly and gone to the bathroom. And was going back to try to shake some hands after the stockholders' meeting. And along about midway in the hall, Mrs. Formby came up to me and told me what her name was.

Q: Did she say anything more than what her name was?

A: She was obviously angry—

MR. RHEA: We object to that as nonresponsive.

THE COURT: Objection is sustained.

A: Yes. She asked for her job back, and demanded it back, to be more precise.

Q: State as best you remember, please sir, her words to you.

A: "Mr. Rutledge, I'm Sarah Formby and I want my job back. I deserve my job back."

Q: Would you describe her appearance?

A: That's the best I can recollect. That was certainly the sense of it.

Q: What was her appearance at that time?

A: She was angry.

Q: Were these words spoken in a conversational tone or more loudly?

MR. RHEA: We object.

THE COURT: Objection—

MR. RHEA: I'm sorry—please the Court, t the suggestion.

THE COURT: Objection sustained.

Q: How loud was she talking, Mr. Rutledge?

A: In a voice that people angry normally talk in

Q: Is that a soft voice or—

A: Well, it was above normal, of course.

Q: Were there other people around you at the time?

A: Yes. And they were moving past us, sort of on either side of us.

Q: What did you say in response to what Mrs. Formby said?

A: I said, "Mrs. Formby, this is not the place to talk about that. I'll be glad to see you in my office next week."

Q: What else occurred?

A: That's all. I moved on—I could see a scene might developed, so I moved away—

MR. RHEA: We object, move to exclude.

THE COURT: Objection sustained.

Q: Did anything else occur?

A: I moved away as quickly as I could.

Q: Did Mrs. Formby come to see you the next week?

A: No.

Q: Has she ever come to see you since?

A: No.

Q: Have you heard from her in any way since?

A: Heard from Mr. Rhea on her behalf.

Q: Other than her, heard directly from her?

A: No.

Q: Mr. Rutledge, does the bank have a personnel policy that relates to age?

A: Yes, sir.

Q: What is the bank's personnel policy relative to age?

A; I try to get the most experienced employees I can, and of course, that means they are older employees.

Q: Mr. Skates was the Executive Vice-President in December and January—December of '84 and January of '85; is that right?

A: No, sir.

Q: What was he?

A: Vice-President.

Q: Vice-President. Excuse me. He was an officer of the bank?

A: Yes, sir.

Q: Did Mr. Skates have any personnel control over personnel decisions?

A: Absolutely not.

Q: Is Mr. Skates still with the bank?

A. No, sir.

Q: What happened to Mr. Skates?

A: I terminated him.

Q: Mr. Rutledge, are there other ladies, women—well, not—I guess I can't restrict that—are there other people that work for the bank that are older than forty years of age?

A: Certainly are, including me.

Q: Mrs. Akins is older than forty; is she?

A: Mrs. Akins, I believe, is sixty-three.

Q: Are there other—are there other people—

A: She's just been promoted to Executive Vice President.

Q: —was there any reason why, had the exchange in the hall not occurred, and had there been a place suitable for Mrs. Formby, that she would not have been rehired?

MR. RHEA: We object to the form of the question, please the Court.

THE COURT: The objection is overruled.

MR. RHEA: We object to the form of the question.

A: Not so far as I know.

Q: You had no reason not to rehire Mrs. Formby, had the situation been different?

A: Absolutely not.

Q: Now after the exchange occurred, is your opinion of that different?

A: Yes, it is.

Q: And in what respect?

A: Well, I had a very difficult stockholders' meeting, obviously, and I think it had been clear to anybody there that it—

MR. RHEA: May it please the Court, we would object.

THE COURT: Objection sustained.

A: I thought that the way she behaved on this occasion under the

circumstances indicated that she would not be someone that I would want to have rehired at the bank.

Q: Mrs. Formby has testified that she went back to Mr. Skates, as I remember it, a couple of times between the time he saw her on the 14th of December and this exchange on the 26th of January. Did Mr. Skates ever report to you that Mrs. Formby had been to see him?

A: He may have. I have no recollection of it, but I can't say that he didn't. He had told me about, you know, different people, and I can't recollect whether Mrs. Formby's name was among them or not among them.

Q: Was her name brought up in such—

MR. PRUETT: Well, I withdraw that, your Honor. That's all I have.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. RHEA:

Q: Mr. Rutledge, you said you were a lawyer and have been a lawyer practicing in Birmingham for more than twenty years; is that correct?

A: Yes, sir.

Q: And you have been a trial lawyer and active in many courts; is that correct?

A: Yes, sir.

Q: And much of your practice involves bringing lawsuits against banks; wasn't it?

A: Yes, sir.

Q: And this continued down to the time you bought controlling interest of the Farmers and Merchants Bank in Centre?

A: Continues until today.

Q: Still continues til today. All right. Now, in connection with your job as President and Chief Executive Officer and Chairman of the Board for awhile, all three of those capacities, I believe you said, then as of last Saturday you relinquished the duties of President and appointed Mr. Hampton, I believe; is that correct?

A: That's correct. Well, the Board elected him, I didn't appoint him.

Q: Are you the majority owner of the stock of the bank?

A: Yes, sir.

Q: In your work, then, you're very familiar with the Age Discrimination in Employment Act; aren't you?

A: I think so.

Q: All right. And the only time, to your knowledge, that you ever saw Mrs. Sarah Formby was on January the 26th, 1985; is that correct?

A: That's correct.

Q: At a stockholders' meeting. How many shares of stock outstanding in the bank?

A: Thirty-five thousand.

Q: Thirty-five thousand shares. At the time—at the stockholders' meeting, I believe you said there were a hundred shareholders present or so, a hundred and ten?

A: That's roughly correct.

Q: And there are a total of how many shareholders together?

A: Four hundred and eighty.

Q: Now, at the time of this stockholders' meeting, did you know

that Mrs. Formby was also a holder of a very few shares of stock?

A: No, sir.

Q: That's come to your attention since that time?

A: Yes, sir.

Q: You did not know that she was there as a stockholder at the meeting, also to greet the new people that were there?

A: No, sir.

Q: All right.

A: I assumed that, I did not know that.

Q: Yes. All right. And you since found out that she's an owner of six shares or so of stock; is that right?

A: I don't know how many. I subsequently found out she owns some. Yes, sir.

Q: Now, on this occasion—and do you recall about the time of day that you first observed Mrs. Formby?

A: I would say right before lunch.

Q: Did you talk to quite a few people that day?

A: After this, I talked to some. I had not talked to any to speak of before this. I had made a talk at the stockholders' meeting, but not--

Q: The stockholders' meeting was a formality, I take it, that—preceding the Board of Directors meeting; is that right?

A: It was not a formality. No, sir.

Q: Did you follow any formality on that day for your—did you have an agenda?

A: Oh, yes, sir.

Q: You followed that agenda?

A: Yes, sir.

Q: Do you recall what it was?

A: There were a number of items on there.

Q: And—

A: I can recall some of them.

Q: Had you concluded your agenda?

A: The stockholders' meeting had adjourned when this took place.

Q: All right, sir. That's what I was wondering. You had been there some time, and these hundred or so stockholders had been there with you?

A: Yes, sir. That's the reason I had left rapidly to go down the hall.

Q: All right, sir. In the banking business, in connection with your relationship to it as a trial lawyer suing banks over the years, and also in your operational aspects of it, you are aware of the importance of the employees who have good relations with customers; aren't you?

A: I don't think I have necessarily learned that from those sources, but I am aware of that.

Q: You learned that as being a depositor in the bank and working with a bank person yourself?

A: Just being out in the world.

Q: All right, sir. And I believe you said Mrs. Akins here was Vice-President, Executive Vice-President?

A: Yes, sir.

Q: And you are aware of the employees of the bank who many of them who worked with Mrs. Formby in regard to ten years of her employment before she was terminated, you know that there are still some employees there; don't you?

A; I'm not sure—are you saying some people were there when Mrs. Formby was there and still there?

Q: Yes.

A: Oh, yes, almost all of them.

Q: Is it true also that some of the employees that were—

A: I mean, almost all of the employees there now were there when Mrs. Formby was there.

Q: And Mrs. Formby, as far as you know, got along well with the customers and with the people?

A: I don't—I don't know anything one way or the other—

Q: You have nothing to the contrary on that?

A: —about that.

Q: Okay. So, your concern was not that she would not get along well with the people; was it?

A: My concern was the circumstances under which this took place, indicated to me that Mrs. Formby lacked judgment and had a bad temper, which could adversely affect the bank. You see, this stockholders—well—

Q: Now, you say lacked judgment?

A: Yes, sir.

Q: Tell me first, Mr. Rutledge, you were going to or coming from the trip down the hall to the restroom, I believe you said?

A: I was coming back from that trip.

Q: And the encounter with Mrs. Formby was just in the hallway leading back to the area where you had the stockholders' meeting?

A: Yes. The stockholders were coming out, and I was going back toward them.

Q: I believe you said that she said to you, "Mr. Rutledge, I'm Sarah Formby, I work for the bank, and I would like to have my job back and I want my job back"; is that correct?

A: No, sir. No, sir.

Q: Okay. Maybe I wrote it down wrong here. Did she—I was

really leading up to ask you how long this encounter took?

A: Oh, I—exchange of several sentences—I don't know.

Q: Three or four—five seconds?

A: Maybe thirty seconds. I really wouldn't know for sure.

Q: You didn't extend your hand and shake hands with her and tell her, introduce you, or say who you were or anything, did you?

A: No, sir.

Q: She addressed you as Mr. Rutledge?

A: Yes, sir.

Q: I see. From that date until this, I believe you said you have not spoken to her?

A: No, I don't believe I have seen Mrs. Formby. I may have seen her in Centre, but I didn't recognize her.

Q: Okay. But it was your judgment, after that thirty-second encounter with her then, that she was a person that lacked judgment?

A: Yes, sir.

Q: And it was your position, after that thirty-second encounter with her, that she was a person that would lose her temper; is that right?

A: Well, she obviously—she lost her temper.

Q: I didn't ask you that. I asked you if that was your opinion; is that right?

A: Yes.

Q: Okay. Now, there was a Leesburg Branch also; wasn't it?

A: Yes, sir.

Q: And that Leesburg Branch has a manager and a teller; isn't that correct?

A: At that time, it had three employees.

Q: All right. Maybe two tellers?

A: It has changed now. Now, it has a manager and a teller.

Q: And you make all of the personnel decisions, and did at this time, made every single personnel decision made in the bank; is that right?

A: Made the final decision. Yes, sir.

Q: Then you're aware of the fact that Leesburg did have a teller there, paying and receiving teller, performing the duties similar to what Mrs. Formby did?

A: Yes, sir.

Q: All right. And that the lady—

A: Actually had two.

Q: Had one or more. I believe you said two?

A: Yes.

Q: And that the paying and receiving tellers were a very young person; is that right?

A: I don't have any idea how old they were.

Q: It was my understanding you said you made all the decisions concerning personnel; did you not have any idea about age?

A: No, sir. I have never concerned myself with age in a—

Q: All right, sir. Mr. Skates that was referred to, was he the Executive Vice-President?

A: He was elected Executive Vice-President at this meeting of January 26th.

Q: At which—did you preside at that meeting?

A: Yes, sir.

Q: You were the Chairman of the Board of Directors?

A: Yes, sir.

Q: And you were the President of the company?

A: No, sir.

Q: You were not President at that time?

A: I was elected President at the Directors' Meeting after this stockholders' meeting.

Q: I see. But you presided at the stockholders' meeting?

A: Yes, sir.

Q: All right. Is it fair to say, then, Mr. Rutledge, insofar as the individual employees of the bank were concerned, that you did not accost each of the individual employees of the bank and explain to them that you were now making all personnel decisions? You notified the Board of Directors of that, I guess; did you?

A: Well, I put out a memorandum about personnel and the lay-off situation that I think carried that impression.

Q: When did you do that?

A: It would have been the people that were laid off — not the Diane Branch —

Q: I understand.

A: — but the other people.

Q: So, that would not have come to the attention, then of Sarah Formby; would it?

A: I don't know about that.

Q: Not officially?

A: I don't know about that.

Q: You didn't see that she got a copy of it?

A: Oh, no.

Q: And you didn't personally discuss this with any of the other employees?

A: Some of them. Yes, sir.

Q: Okay. Did you do it before the Diane Branch was closed or

afterwards?

A: Some of them, I discussed what the situation would be immediately upon taking over back in November, when I had my first meeting with them and told them what my policies would be.

Q: Mr. Rutledge —

MR RHEA: At this time, I would like to have this marked as an exhibit.

THE COURT: It's already marked.

THE CLERK: Yes, sir.

MR. RHEA: I'm sorry, sure it is. Thank you.

Q: It has been marked at Plaintiff's Exhibit 1. I believe it's received into evidence with the —

THE COURT: Yes, sir.

MR. RHEA: — with the permission to carry over the multiples.

THE COURT: Yes.

Q: Mr. Rutledge, it's been approximately thirteen and a half months, would you agree, since the Diane Branch was closed, or December the 14th, when Mrs. — '84 — when Mrs. Formby was let go?

A: Been twenty-seven months.

Q: Excuse me, twenty-four plus one and a half this year; it that right?

A: Twenty-six, I would say.

Q: About twenty-six months, would that be a good time has elapsed?

A: December 14, 1984 to February the — February the 11th.

Q: Yes. I believe your testimony was that even though the bank — the Diane Branch had remained open for a couple of weeks, that

Mrs. Formby had left on December the 14th is your understanding?

A: Yes. You can't close a branch without the regulatory authority's permission.

Q: All right, sir. So, would you again give me the number of months that elapsed just to the best of your judgment?

A: Twenty-four, twenty-five and a half.

Q: Okay. Now, there is already —

MR. RHEA: And I offer it into evidence, if it please the Court —

THE COURT: It's in evidence.

MR. RHEA: — with the right to multiply these figures by twenty-five and a half to the extent the Court permits. I want to ask one further question.

(Plaintiff's Exhibit 1 received in evidence.)

Q: As an employer, does the employer pay Social Security benefits and provide for Social Security benefits a cost, or part of the cost, and fifty percent provided by the employee?

A: The employer contributes a portion of the Social Security tax. Unless I am mistaken, which on taxes I can easily be, I don't think that amount is constant throughout the whole contribution. I think it changes perhaps as the amount of the contribution changes.

Q: Yes. Let me just ask you this: As an individual, self-employed person, of course, you pay a particular percentage as an employee. Now, I'm addressing the — are you an employee of the bank?

A: Yes, sir.

Q: You draw a salary from the bank?

A: Yes, sir.

Q: So, the bank will be paying a seven percent and making you pay seven percent up to a certain portion of your salary; is that correct?

MR. SHUMAKER: We're going to object to this line of questioning, if the Court please. I don't believe it's relevant or part of the cross-examination of this witness.

THE COURT: The objection is sustained on the grounds it's not a matter that was inquired of the witness on direct evidence.

MR. RHEA: May it please the Court, we would simply offer a stipulation that the — that this bank did withhold from her, Mrs. Formby, a portion that is Social Security and paid a portion for her which was one of the benefits she received.

THE COURT: It that a stipulation?

MR. SHUMAKER: We wouldn't object to that. No, sir.

MR. RHEA: Then we would offer to show it to the witness that they did that. He's the President, Chief Executive Officer, owner of most of the stock, and would know the procedure they followed, I take it, in compliance with the Social Security law.

THE COURT: I sustain the objection.

Q: You didn't do the day-to-day bookkeeping and housekeeping, I know at the bank, Mr. Rutledge, but you are aware that your company, your bank, did in response to interrogatories, submit certain employee evaluation forms pertaining to Mrs. Formby. Are you familiar with that?

MR. SHUMAKER: Judge, we are going to object to the form of that question, it's not proper cross-examination.

THE COURT: Was this a matter gone into with the witness of direction examination?

MR. RHEA: Judge, this is the first time I have had a witness

here that I know of that we can put into evidence the evaluation forms that are maintained by the company. This was a matter in the pretrial order and a matter that the parties referred to in their exhibits. This is a matter that was furnished to us by the company.

THE COURT: Yes, sir. But, if it were not a matter gone into with the witness on direction examination or touching on his credibility, the objection is going to be sustained.

MR. RHEA: Well, it's my first chance to examine this witness. I don't tender the witness, if it please the Court, and I don't think I'm limited — I think I'm allowed on cross-examination to bring up those matters which are relevant to my client's case.

THE COURT: Give me the Federal Rules of Evidence right there. I'll read to Mr. Rhea Rule 611(d) of the Federal Rules of Civil Procedure — Federal Rules of Evidence — provides cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.

MR. RHEA: Judge —

THE COURT: I'm just telling you — giving you the bias of my sustaining the objection.

MR. RHEA: I'm familiar with that rule. I understand.

THE COURT: And there's no point in —

MR. RHEA: And I respectfully except.

THE COURT: Well, if you need me to, I'll; point you to the Federal Rules of Civil Procedure that says exceptions aren't necessary.

MR. RHEA: I know for the basis of the ruling of the Court and I certainly respect the Court.

THE COURT: All right.

MR. RHEA: Not sure whether this has been inquired into — I believe that's all. Thank you.

THE COURT: Redirect.

MR. PRUETT: We have nothing further.

THE COURT: Thank you, Mr. Rutledge.

(Witness excused.)

THE COURT: Mr. Pruett.

MR. PRUETT: Defendant rest, you Honor.

THE COURT: Rebuttal?

MR. RHEA: Yes. I would like to recall Mrs. Formby.

SARAH FORMBY, THE PLAINTIFF, RECALLED

FURTHER DIRECT EXAMINATION

BY MR. RHEA:

Q: You have testified earlier, Mrs. Formby, I just wanted to ask you a few things here. With respect to your efforts to obtain employment from this bank, when you spoke to Mr. Rutledge, were you trying to get your job back at the bank?

A: Yes, sir.

MR. SHUMAKER: We are going to object, if the Court please, to the form of that question as leading.

THE COURT: Objection is sustained. Rephrase your question.

Q: Tell us, if you will, with respect to getting your job back from the bank, what you said to Mr. Rutledge.

A: I had never been formally introduced to Mr. —

MR. SHUMAKER: We are going to object to not being

responsive.

THE COURT: Objection sustained. Mrs. Formby, just tell them what you said to Mr. Rutledge.

Q: Just tell us what you —

A: I had never met Mr. Rutledge —

Q: Just tell us what the conversation was. I believe the Court's instruction is —

A: Excuse me, just the conversation. Okay. I went up to Mr. Rutledge and introduced myself as Sarah Formby and a former employee and asked him if any opening in the main bank came open that I would love to have it, that I would love to work for him. And at the time, I didn't know he was angry and I didn't know I was angry. You're usually more humble, I think, when you're asking for work than you would be normally at any other time.

MR. SHUMAKER: Object. We would move the Court to instruct the jury to disregard the last statement.

THE COURT: The jury will disregard the last statement.

Q: Did you at any time, so far as you know, express any anger to him?

A: No, sir.

MR. SHUMAKER: We are going to object to leading the witness, if the Court please.

MR. RHEA: This was done —

THE COURT: Objection overruled.

Q: Yes, you may tell us.

A: No, sir. I did not know that he was angry and I want not angry. I was merely asking for work. And when he said that he asked me to come to his office the next week, that's not right, because if he had —

MR. SHUMAKER: If the Court please, we are going to object.

A: — I would have gone, I wanted my job.

MR. SHUMAKER: To the answer not being responsive to the question. Move that it be stricken.

THE COURT: Objection sustained. Jury will disregard the last statement. Mrs. Formby, Mr. Rhea will ask you questions.

THE WITNESS: Yes, sir. I'm sorry.

THE COURT: I'm not trying to cut you off or anything, but you have to answer the question that he asks you. And he'll ask you the questions which are relevant.

THE WITNESS: Yes, sir.

Q: Did Mr. Rutledge ever tell you to come to his office?

A: No, sir.

Q: Had he done so, would you have gone?

A: Yes, sir.

Q: Did Mr. Rutledge or anybody else tell you how you could apply for a job any way other than what you were trying to do?

A: No, sir.

Q: And other than that, did you continue your efforts to apply for a job with the bank, in other places?

A: At other banks and other places. Yes, sir.

Q: I believe you earlier testified you have been down to the present time, and want to go back to work for the bank; is that right?

MR. SHUMAKER: We're going to object.

THE COURT: Objection is sustained.

MR. RHEA: I asked it in this fashion earlier without objection, please the Court, I'll just ask it again if I may.

THE COURT: Well, if you asked it earlier without objec-

tion, then the objection now is due to be sustained on the grounds it's repetitive.

MR. RHEA: All right, sir. Very good. I don't want to transgress the Court's instructions earlier, I would ask her if they took out Social Security on her money, and I would put that on the chart, if permitted.

THE COURT: That's not transgressing my ruling, Mr. Rhea. The reason why I sustained the objection when you put the question to Mr. Rutledge was that he had not been asked concerning that issue on direct examination. This is your witness, it's direction examination, and you may ask her whatever you please.

MR. RHEA: Thank you.

Q: When you worked for the bank, were you under Social Security?

A: Yes, sir.

MR. SHUMAKER: Judge, we're going to object to this line of questioning as not being rebuttal testimony. This is direct testimony which he did not put on at the initial time he had this witness, and I would move to exclude it and object to this testimony.

THE COURT: What does it rebut?

MR. RHEA: Judge, this is just an additional benefit that I — they withdrew money from her when she was working there. We would like to show it as a loss she suffered as a result of being fired.

THE COURT: Well, if the jury finds that Mrs. Formby was discriminated against because of her age, the bank will be required to give her all of her accrued benefits, benefits that she would have been entitled to had she not been discharged. And to the extent

that that requires it to pay some monies into the Social Security system, then it will be required.

MR. RHEA: I certainly won't pursue that. May it please the Court, I want to inquire one other thing. Again, I don't want to transgress. I'm going to ask the client, if pursuant to our request, evaluation forms were furnished by the — at the first, they denied they were furnished to us. In response to interrogatories, I'm going to ask if this is it and it would have been put in through another witness to whose deposition it was an exhibit.

MR. SHUMAKER: Judge, we're going to object to the statement that Mr. Rhea is making before the jury concerning an item of evidence in evidence. We're going to object to the item as not being rebuttal testimony or rebuttal evidence.

THE COURT: Objection sustained.

MR RHEA: That's all I have. Answer their questions.

THE COURT: Cross-examination.

MR. PRUETT: No, your Honor.

THE COURT: Thank you, Mrs. Formby, you may come down. Any further rebuttal evidence?

MR. RHEA: No further rebuttal evidence, may it please the Court.

THE COURT: Ladies and gentlemen, that concludes the evidence in the case. Would you retire to the jury room, please.

(In open court, jury not present.)

MR. RHEA: May we put the multiplication on the chart?

THE COURT: If it doesn't interfere with my charge conference, Mr. Rhea, but we are proceeding to the charge conference right now.

The Court will give the Pattern Jury Instructions from the

forms suggested by the judges of the Eleventh Circuit for the general charges. The substantive charge will be as follows: After each sentence, I will pause and give you a chance to register an objection.

In this case, the plaintiff claims that the defendant discriminated against her by discharging her and later failing to recall her because of her age.

The defendant objects to the Court mentioned the discharge?

MR. PRUETT: Yes, your Honor.

THE COURT: Objection is overruled. More specifically, plaintiffs claims that she was discharged by defendant when it closed this Diane Branch and that the defendant failed to transfer or recall her because of her age. Same objection by defendant?

MR. PRUETT: Yes, sir.

THE COURT: Same ruling.

MR. RHEA: No objection.

THE COURT: Under Federal law, it is unlawful for an employer to discharge or fail to recall an employee because of that employee's age, when the employee's age is between forty and seventy.

In order to prevail on her claim, plaintiff must prove by a preponderance of the evidence: One, that she was within the protected age group; that is, between the ages of forty and seventy; two, that she was discharged from the Diane Branch of the defendant branch and not transferred or recalled to a similar position at another location of the bank; three, that she was qualified to work in a similar position at another location of the bank; and four, that her age was one of the determining factors that caused the defen-

dant not to transfer or recall her to a similar position at another location of the bank.

MR. RHEA: No objection.

THE COURT: Plaintiff must prove that the defendant intended to discriminate against her because of her age. The defendant denies that it discharged plaintiff or failed to transfer or recall her because of her age. It says that she was discharged because the Diane branch where she worked was closed for a legitimate business reason. It says that the plaintiff was not rehired because she never made a formal application for reemployment and that her informal inquiry to its President and Chief Executive Officer was not in good faith as the plaintiff rudely and unpleasantly accosted him, knowing that her actions would insure that she would not be rehired.

Plaintiff was not a union employee, since there was no seniority system. The fact that she was employed as a teller longer than some other employees does not in and of itself prove age discrimination. Defendant, as an employer, is entitled to make its own subjective —

MR. RHEA: Judge, I want to object to that preceding one. I'm letting it —

THE COURT: All right.

MR. RHEA: I understand you're going to give it.

THE COURT: The plaintiff objects to the preceding statement, and the objection is overruled. Defendant, as an employer, is entitled to make its own subjective business judgments regarding the selection of employees for termination so long as it does not discriminate on the basis of age.

MR. RHEA: I think it's all right. I'm not —

THE COURT: I suggest to you that you don't lose anything by objecting.

MR. RHEA: I have got to object, because you're not including some things that ought to be there.

THE COURT: All right. The objection is overruled. You, the jury, may not substitute your judgment for that of the defendant in this matter, even thou you personally may not approve of the defendant's exercise of its judgment, or you personally would have acted differently.

MR. RHEA: I object. That's confusing, Judge.

THE COURT: All right.

MR. RHEA: Doesn't state the law.

THE COURT: Objection is overruled. The law does not require that advanced age or substantial length of service entitles employees to special favorable consideration, and it does not require that an employer adopt a policy that will maximize the number of older employees in its work force.

MR. RHEA: I object.

THE COURT: Objection is overruled. If you find that the reasons given by defendant for its discharge of plaintiff and its failure to rehire her are not the true reasons, and that the true reason is that plaintiff was an older employee, then your verdict must be for the plaintiff.

In summary, the burden is on the plaintiff to prove each element of her claim by a preponderance of the evidence. If she fails to do so, your verdict must be for the defendant. If she carries this burden, then your verdict must be for the plaintiff, and you would then turn to the issue of damages.

Damages for a violation of the age discrimination law

consists of the back pay which the plaintiff would have earned had she not been discriminated against. It also includes any accrued benefits which the plaintiff would have received had she not been discriminated against.

MR. RHEA: Judge, if you don't mind reading that again.

THE COURT: Damages for a violation of the age discrimination law consists of the back pay which the plaintiff would have earned had she not been discriminated against.

MR. RHEA: That's certainly not complete.

THE COURT: It also includes any accrued benefits which the plaintiff would have received had she not been discriminated against because of her age.

MR. RHEA: Still don't believe it's complete enough.

THE COURT: What does it take to complete it?

MR. PRUETT: Would that be to the date of trial?

THE COURT: Yes.

MR. RHEA: Entitled to recover the value of lost employment benefits. Please the Court, examples include health and welfare insurance premiums paid by the employer; life insurance premiums paid by the employer; vacation pay, holiday pay, pension payments paid by the employer. And I believe that yours is unduly restrictive, and I think it would include, in other words, those items that we have listed over there, in that we contend that you're building protections from those benefits as they go along, and they are benefits that she would be entitled to.

THE COURT: Mr. Rhea, I take it you are reading to me from a case?

MR. RHEA: I beg your pardon, sir?

THE COURT: Are you reading to me from a case?

MR. RHEA: Judge, there is a split authority, and I'm not reading the whole thing, but the citation here is — gives Notes 120 through 128 and accompanying texts. And it's a long explanation of it, but —

THE COURT: Well, I have never understood that you can cite me a case. What you are reading to me from is apparently some treatise or article on this —

MR. RHEA: It is a — it's the Labor Lawyer, and it's a recent issue, may it please the Court.

THE COURT: I have just thought, Mr. Rhea, that it was Hornbook law, that under the ADEA, an employee who was discriminated against was entitled to back pay and any accrued benefits which she lost during the period of unemployment.

MR. RHEA: Judge, I think that does state a truism. I think it states correctly the law up to a point. I'm afraid it unduly limits — that is all right — that, I think what you say. is correct. I just say that I would not want to say that we are then precluded from providing those employment benefits which she would have been drawing had she been there.

Of course, as you say, and maybe under liquidated damages, if we got a verdict and the Court found liquidated damages and we are entitled to it under liquidated damages, this might be something that is considered.

THE COURT: What I have said does not exclude any of the damages that you have listed up on the board.

MR. RHEA: All right, sir. That was my concern. I was afraid you were —

THE COURT: No, sir. My statement does not exclude any of those damages.

MR. RHEA: All right, sir.

THE COURT: Plaintiff may not recover any damages for emotion distress, embarrassment, humiliation or mental anguish suffered as a result of the unlawful discrimination.

MR. RHEA: I object to the statement, although —

THE COURT: Well —

MR. RHEA: I object to the — are you going to give that?

THE COURT: Directing your attention to Rule 11, Mr. Rhea, is this an incorrect statement of the law?

MR. RHEA: No, sir. I really don't think it is an incorrect statement of the law, but I protect my client, because I may not be all that knowledgeable of the law, I want to object to it.

THE COURT: Well, under Rule 11, Mr. Rhea, you may protect your client but get yourself in a world of trouble about objecting when you know there's no legal basis for objecting.

MR. RHEA: I know of no legal basis.

THE COURT: It is clear crystal under the law that the plaintiff may not recover for emotional distress, embarrassment, humiliation under age discrimination.

RM. RHEA: Yes, sir. I thought you mentioned some other things other than those.

THE COURT: And mental anguish.

MR. RHEA: Mental anguish, I agree you cannot. Emotional distress, you cannot.

THE COURT: Embarrassment.

MR. RHEA: Embarrassment. I haven't seen the word humiliation in the case, but you may be exactly right.

THE COURT: Plaintiff may not recover punitive damages in this action, or damages designed to punish the defendant.

MR. RHEA: I — I believe that's correct.

THE COURT: Under the law, the plaintiff has the duty to mitigate damages, that is, she must seek comparable employment during the period of her unemployment in order to minimize the damages to which she would otherwise be entitled.

MR. RHEA: She has a duty to mitigate damages. Beyond that, I'm not sure that's fair.

THE COURT: Well, I think I'll — should I just leave it that she has a duty to reduce or mitigate her damages?

MR. RHEA: Yes, sir. I think that is a fair statement. I don't know how you get comparable employment, please the Court.

THE COURT: All right.

MR. PRUETT: Your Honor, when you —

THE COURT: Yes.

MR. PRUETT: — when you say "mitigate damages", would you explain the meaning of "mitigate". There might be some on the jury that —

THE COURT: What I plan to say is that she has a duty to mitigate or reduce her damages.

MR. RHEA: Seek employment. It's my understanding that's what you're talking about.

MR. PRUETT: I guess my problem is not a point of law, just a question of their understanding clearly what —

THE COURT: Well, this is the entirety of the paragraph I plan to give on that issue: Plaintiff has the duty to mitigate or reduce her damages. If you find that she could have or should have been more diligent in seeking other employment after her discharge, then the back pay award should be reduced by the amount she reasonably could have earned by the other employment.

MR. PRUETT: That's fine, sir. Thank you.

THE COURT: Damages must not be based on mere speculation, guess or conjecture.

MR. RHEA: I agree with that.

THE COURT: All right. Now, I'm not going to submit the issue of liquidated damages to the jury. I will decide the issue of willfulness, and if the jury finds that the plaintiff was discriminated against because of her age, based on Mr. Rutledge's acknowledged awareness of the law the violation was willful, and liquidated damages will be assessed. And the defendant objects and the Court overrules the objection.

MR. PRUETT: Your Honor, may I, for purposes of protecting my record, renew my motion for a directed verdict at this time?

THE COURT: Yes, sir. The motion for directed verdict is received by the Court and it's overruled. Now, how much time do you want to argument?

MR. RHEA: Fifteen minutes. I would like to have ten and five.

MR. PRUETT: That would be plenty for me. I understand that the closing is rebuttal only for the plaintiff?

THE COURT: No, sir. Closing is anything he wants to say.

MR. PRUETT: His closing after mine?

THE COURT: Yes. In fact, he can waive opening statement and let you get up and then come and make his own statement after you made your argument.

THE COURT: Not like Rule 609.

MR. PRUETT: Different.

THE COURT: Objection to the procedure is overruled.

MR. PRUETT: I'm just inquiring, your Honor.

THE COURT: May the alternate juror deliberate with the other six?

MR. PRUETT: Fine with me.

MR. RHEA: No objection.

THE COURT: Let's let the jury take a break until 2:20 and we'll come back at 2:20 and begin the summations.

Thank you, gentlemen. I appreciate the efficiency you have shown today.

(In open court, jury present.)

THE COURT: Ladies and gentlemen, we will now hear the closing arguments of counsel. Since plaintiff has the burden or proof, she has the right to pen and close the argument. We have allotted fifteen minutes per side for closing arguments. How will you divide your time, Mr. Rhea?

MR. RHEA: Ten and five.

THE COURT:. All right.

MR. RHEA: May it please the Court.

THE COURT: Mr. Rhea.

MR. RHEA: Ladies and gentlemen of the jury, counsel and the defendant. We had, at our opening, attempted to say what we thought the evidence would show. On behalf of Mrs. Sarah Formby, I tried to tell you what I thought her case would show and Mr. Pruett, Mr. Shumaker, of course on behalf of the Farmers and Merchants Bank, told you what they thought their evidence would show.

At this point in the trial, two things I'm sure are in your mind: One, we're glad it's over, I know you feel that way. I tell you, all parties share in thanking you for your patience. The Court made you aware at the outset of the great importance of the jury

system to all of us. We lawyers are officers of the court, and as the Judge told you at the outset, he'll tell you what the law is and we better not presume to try to tell you what it is. If we tell you wrong, he'll straighten it out. Sometimes we, in our zeal, sometimes transgress it, and we may say something about what the law is that maybe isn't the law. You can rest assured that the Court will tell you what the law is. But we do feel that as lawyers for — trial lawyers for the plaintiff and defendant — we have a responsibility of bringing to you what we think the facts are. And the facts in this case are fairly simple.

For anyone who has a history of having to work for a living, as most of us do, and some of us can remember starting back preteenage and some maybe later in life, but all of us somewhere in life start working for a living. And then some of us, as we got a little older, and many of you haven't achieved that, and none of you have achieved the age some of us have, but nevertheless, as you get older, the importance of the job makes itself manifest a lot more than it did, at least when I was young, real young, and relatively young. But today in this trial, the Age Discrimination in Employment Act, you're listening to a case where you're a unique group that will never again sit in a similar configuration. Never again will this exact group of people hear this exact group of facts and deal with these exact problems. And it's the one opportunity that the plaintiff and the defendant have to present a case to a jury involving the age Discrimination in Employment Act.

The Court has told you, will tell you, of course, that there are protected people in society with respect to age. If you are under forty, you are not protected. If you are over seventy, the time we are dealing with this, you are not protected. But as between forty

and seventy, you have a right and are protected from being discharged or not promoted or not recalled, where a factor in the failure to be promoted or failure of discharge is age.

Now, it's very important that we also understand that sometimes people tell us things that require a very careful analysis to find what the real truth is, what the real facts are, and find out why something happened that did happen. As the plaintiff in this case, we have to show to you that a factor that caused this lady not to come back to her job or to be recalled, or the reason she was fired, whatever, was age. And we put on evidence here of people who are now working, people who are vice-presidents of the bank, people who have worked with her for ten years, nine years, eight years, worked closely with her, saw her on a daily basis, saw her on a monthly basis, lived in the community with her. And without exception, those who knew her, who worked with her, said she was highly qualified; she was liked by the people, she had an excellent relationship with the customers of the bank, she was a desirable employee. Not just those we called, with one exception. There was only one exception. And the exception was this distinguished trial lawyer here, Mr. Rutledge, who practices law full time in Birmingham and runs a bank in Centre, Alabama.

And a few weeks after he came up there, he abolished the Diane Branch, which I'm not arguing as to whether he had a right to do that, it's immaterial. I don't think that's important. But Mr. Rutledge, whether he's acting as Chief Executive Officer, owner of most of the stock in the bank, President of the bank, Chairman of the Board of Directors — had a duty, if he's going to assume all this responsibility — he had a duty to see that those who worked for him implemented and carried out, as he said he knew about the

Age Discrimination in Employment Act. I asked him that. He said oh, yes, I know about that.

What was the reason this lady was let go? You think it was because — and he didn't even know she was a stockholder — he didn't know she held a very few shares of stock in the bank, but she held a few shares. He didn't know she was a stockholder. You put yourself in a position in any town, small or large. You work some place for ten years, you thought you had the finest relationship with your employer, your customers. You loved to go to work everyday, you loved people, and you are let go and you want to see the man that may have something to do with letting you get your job back. You're happy, it's a pleasant occasion. You're at a stockholders' meeting, even if you only own three or four shares of the bank out of thirty thousand. And the natural thing to do would be to say, Mr. Rutledge, I'm Sarah Formby, I worked for the bank, I want to come back to work. As she said to you, I need a job. I want to work.

And then you take the fact that for ten solid years, everyday of your life, you smiled at the public, you have loved the public, you have helped the bank. The former Chief Executive Officer and President of the bank had brought her back and let her spend a year at the main office when it was expanded, because she had such a —she came back to assist, she said, in teaching the people how to use the drive-in windows and things like that. Do every aspect of banking work. She could do everything that any employee could do. Everything that a branch manager did, she did. When the branch manager was gone, she was there. She handled the loan collections, depositing the money, everything that was done in relationship to the big bank.

I suggest to you that to say that this lady was fired or not allowed to work for that bank because she was unkind to this man in a few seconds she saw him on that occasion is a mere pretext. That's not the reason she was fired and not allowed to come back.

I suggest to you that as Richard Skates told her, the vice-president of the bank said when she wanted to be retained in a job, "You know I can't let some pretty young people go", or whatever. Whatever the reason, it was not — it was because of her age, that was a factor in it. If it was a factor in her not being allowed to work today, we are entitled to recover and the Court will tell you that.

But she had — she was pleading for a job. What do you do when you try to get a job? You can only ask for it. We can't force our way back in. We can only ask for it. That's what Sarah Formby did. She was highly qualified. She could do any of the jobs they left open. They had a lady at the Cedar Bluff Branch that was young —

THE CLERK: Time.

MR. RHEA: And I'll have just about five more minutes to talk to you after Mr. Pruett speaks. Thank you.

MR. PRUETT: If it please your Honor, my notes are not notes for a speech, they are of the Judge's charge so I can remember what he has told us about the law that he is going to tell you in a few minutes, because that is the focusing point of the case.

As you have heard, there have not been a lot of disputed facts. There are very few points where the witnesses say anything different. We know without question that a decision was made to close the Diane Branch. We know that Mrs. Formby worked there. We know that she was over forty years of age. We know the Diane Branch was closed, and that when it was closed, she lost her job.

And then what else do we know?

We know that other people lost their jobs in a unrelated reduction in the bank's personnel. And then we know that three of them were brought back to work in this period from the time of the 14th day of December, 1984 up until the 26th of January. Beyond that, there is no evidence of other people coming back, or their ages, or anything. We are dealing with a short period of time and with a very few events.

One of the things we are not here to try today is whether Mr. Richard Skates handled his personnel dealings very well.We probably all have an opinion about that after hearing the evidence. And we're not here to try that. It doesn't make any difference that he did it well or did it poorly.

It doesn't really make any difference that Mr. Rutledge is a trial lawyer and has sued banks before and has a full-time law practice in Birmingham. The only real question you have, and Judge Clemon will tell you this very precisely when he gives you the law in the case, is whether because of her age, because of her age, Mrs. Formby lost her job in the first instance, and whether because of her age she was not rehired when these two younger ladies were brought back to their jobs in the bank. The third lady, you may remember, was also in the protected group, over forty.

Well, you have to look at the evidence. I wish this were a matter of measuring things with a ruler. Life would be a lot easier if our questions were like that. It's not. Was her age why she was terminated in the first instance? There's not question that the evidence is absolutely clear that the bank had financial problems. That's not unusual. In these days, at least up here in North Alabama, that's not something new at all. We have seen lots of

companies with that problem. The Goodyear Tire and Rubber Company, even, has had that problem. That's not something brand new.

And when you have that kind of problem, you have to do what you can to solve it. And unfortunately, sometimes you have to reduce staff. That's what happened here. The branch is still closed. The evidence there is quite clear. Did age have anything to do with that? No. That job was gone because they didn't need the branch anymore. Hadn't needed it for some time before it was closed.

Now, there's only one real piece of evidence in this case that has anything to do with Mrs. Formby's age, and that is a statement that she says Mr. Skates made to her. I can't remember it exactly, but it had something to do with why she was being let go. And as I remember it, Mr. Skates said something to the effect, "Why, you know, I'm not going to let a pretty young lady go." I don't know whether Skates said it or not, but that's the evidence.

Now, is that real evidence that what happened to her in that first instance was because of her age? She had already been terminated. Skates came and told her she had been terminated. The question was, why? And the reason that she had been terminated was because the branch was closed.

But, now, that's not the end of the case for the plaintiff, of course. The question is, what about when these other two ladies were brought back? Did age play — I think the Court will use the words "determining factor" - in the decision not to put her in one of their jobs? Remember, they came back to the jobs they had left.

There is one area of disagreement I need to mention. My experience as a father of two young daughters who are just starting

to work is that jobs are every bit as important to young people as they are to old folks like me, to older folks like Clarence Rhea.

Now, did Skates' statement really mean that Mrs. Formby wasn't being rehired, wasn't being given one of those jobs because of her age? I don't think so. I don't think the evidence supports that, and I'll suggest a reason to you: He was the man she went to see when she wanted to get her job back. Remember, she spoke of going to him at least a couple of times.

Now, if you think somebody is not going to treat you fair, that he's got his mind already made up, that as long as there are pretty young ladies out there that can be brought to work, you don't have a chance at it, you don't waste your time going to see him. Nobody I know does anything just to be doing it.

I agree with Mrs. Formby, when you go to try to get a job it's a very serious occasion. And you don't waste your time. I don't think she thought Skates meant it, if he said it. Don't think she thinks that today, her actions show she didn't think that.

And then she went to see Rutledge the one time, the one unfortunate occasion, and did not go back again to see him. Are we trying this case because you don't think that Rutledge handled his end of it very well? No. Once again, you have a very hard job. You have to apply the law as Judge Clemon gives it to you to this case, and the evidence simply isn't there. You may not like what happened. I think I might do it differently. Probably you would. But the law doesn't say you owe somebody money, the law doesn't say you go to jail, the law doesn't say bad things happen to you because you do things that other people don't like. The law says that happens if and only if you do something wrong. And the wrong in this case, and the only wrong in this case, is whether Mrs.

Formby was not brought back to work, or was fired in the first place, but really was not brought back to work because she was sixty-one years old, or fifty-nine at the time.

For whatever the reason, may have been a reason that's not a good reason. But the Judge will tell you also that you can make decisions for reasons that others don't think are good reasons and as long as they're not infected by discrimination. As long as they are not infected by what the law says is wrong, then you're not guilty of doing — you're not guilty of breaking the law. You're not guilty of violating the discrimination act.

It would be very easy if we could all make decisions on the way we feel. Unfortunately, that is your sworn duty in this case not to do. I got it backwards — it's your sworn duty in this case not to do things that way. And I believe — I suggest that if you will carefully evaluate the evidence, you will see that it is not there, and that this is not a case of age discrimination. Thank you very much for your attention.

MR. RHEA: Ladies and gentlemen of the jury, as I indicated earlier in the course of the testimony we brought out, that there is a catastrophic impact on a person that loses employment. The catastrophes impact would be, for most of us, loss of earnings. Loss of earnings were testified here, and you will have in the jury room with you this exhibit which shows that — we show nineteen thousand four hundred dollars — doesn't sound like a lot of money maybe, but the lady was earning seven hundred dollars a month. And translated into twenty-five and a half months, she's lost up to now, up to now, seventeen thousand one hundred fifty dollars. And then sixteen hundred dollars in hospital insurance, all of these translated out, unless we made a few cents' errors,

nineteen thousand dollars and four hundred dollars is the verdict that we would hope that you would render.

And that's a verdict in money. And the Judge will tell you that you can't pay her for humiliation, you can't pay her for those things such as that. No punitive damages that you can pay her. This is the sort of claim that we make. She's entitled to that money.

The loss is not only — and she, as she says, would love to go back to the bank. And maybe the bank will take her back, we hope they will. If the bank pays this money to her, then maybe they'll offer her job back, we don't know.

But, in a small town, a lovely lady, with ten years of good work, with a world of friends, friends that are still doing business with the bank, some of them still employed there. World of people who recognize that this lady may be just caught in the crunch, as a lot of times happens, and got run over and trampled because you didn't consider her particular set of facts. That's basically what the defense would say to you, that age had nothing to do with it whatsoever.

But the Court is also going to tell you this: And you're getting this case because she was told by a vice-president that it was the youngsters and pretty people and so forth were not going to be fired. But in addition to that, they would like to stop it there and say Mr. Rutledge comes on the scene and says, I make all the personnel decisions. Nobody makes any personnel decisions but me, I make them.

And then he would have you believe that he would be the cold and cruel and efficient sort of individual that seeing this lady one time on a thirty-second encounter, that he would refuse to allow her to work there. I say that's a mere pretext, and what

actually happened there in that few seconds was that she pleaded with him for her job. That's what you would have done. That's the only way you would have know to get your job back. That they deliberately refused to bring her back.

Don't let a pretext prevent you from paying this lady and putting her back on her job where she wants to be, where is would be in the best interest of the bank and the community for her to be. Don't let a pretext, something like that, for an individual who says, I never say her before, didn't know her since, that's not the basis on which you kick a person with ten years out. It's a mere excuse that won't sell. And the Judge will call that, I think and tell you, they don't have a right to do that on pretext.

You'll think in this term: Was she highly qualified? Had she worked, was she discharged, were they jobs there that she could do? And it's undisputed in the testimony that there were younger people there, there were people in their twenties doing work that she did, tellers; lady working in another branch bank in her middle thirties or twenties, not protected by the law. This lady was. Or even if they were over forty under sixty-one, she was fifty-nine at the time and she's entitled to the protection.

The only way that anybody gets protection is if juries like you are willing to stand up and give them this protection. As you know, and I know, it's the toughest sort of thing that happens, because so many people, unless people like you protect them, are vulnerable. Anybody over forty is vulnerable, we need your protection. Thank you.

COURT'S ORAL CHARGE

THE COURT: Members of the jury: Now that you have

heard all of the evidence and the arguments of the lawyers, it is my duty to give you the instructions of law applicable to this case. It is your duty as jurors to follow the law as I shall state it to you and to apply that law to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but you must follow all of the instructions as a whole. Neither are you to be concerned about the wisdom of any rule of law stated by me to you. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given to you by me. It would also be a violation of your sown duty as judges of the facts to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case, you must not be swayed by bias, or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by me, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community and holding the same or similar stations in life. The bank is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons stand equal before the law and ought to be dealt with as equals in a court of justice.

Where corporations, such as a bank is involved, of course, it may act only through natural persons as its agents or employees.

In general, any agent or employee of a bank, corporation, may bind the bank by his actions and declarations made while acting within the scope of the authority delegated to him by the bank, or within the scope of his duties as an employee of the bank. As I said earlier, it is your duty to determine the facts. And in so doing, you must consider only the evidence in the case.

The term evidence includes the sworn testimony of the witnesses and the exhibits admitted into the record. Remember that any statements, objections, or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most helpful or most significant to their side of the case. And in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that governs in this case. What the lawyers say is not binding on you.

Now, while you are required to consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in light of common experience. In other words, you may make deductions and reach conclusions which reason and make common sense lead you to draw from the facts as you find them from the evidence in the case.

Now, I have said you must consider all of the evidence. This does not mean that you should accept all of the evidence as being true or accurate. You are the only judges of the credibility or believability of each witness and the weight to be given to that witness' testimony.

In weighing the testimony of a witness, you should con-

sider the witness' relationship, if any, to the plaintiff or to the defendant; the witness' interest, if any, in the outcome of the case; the witness; manner of testifying; his or her candor, fairness and intelligence; and the extent to which the witness has been supported or contradicted by other evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence of any fact. You may find that the testimony of a smaller number of witnesses on a given point is more believable than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or impeached by contradictory evidence, by a showing that the witness has testified falsely concerning an important matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony. If you believe that any witness has been impeached in either of these ways, then it is your right to give the testimony of that witness such weight, if any, as you think it deserves.

In a civil action such as this, the burden is on the plaintiff to prove each essential part of his claim, or her claim in this case, by a preponderance of the evidence. A preponderance of the evidence means such evidence as when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to prove a claim by the preponderance of the evidence simply means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved

by a preponderance of the evidence, you, the jury, may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits, regardless of who may have produced them. If the proof should fail to establish any essential part of the plaintiff's claim by a preponderance of the evidence, then you, the jury, should find for the defendant.

Now, the plaintiff in this case makes one claim, and that claim is that the defendant discriminated against her by discharging her and later failing to recall her because of her age. More specifically, the plaintiff says that she was discharged by the defendant when it closed its Diane Branch; and that the defendant when it closed its Diane Branch; and that the defendant failed to transfer or to recall her because of her age. Under Federal law, it is unlawful for an employer to discharge of fail to recall an employee because of that employee's age, when that age is between forty and seventy.

In order to win on her claim, the plaintiff must prove each of the following things by a preponderance of the evidence: Number 1, that she was within the protected age group; that is, she was between age forty and age seventy; Number 2, that she was discharged from the Diane branch by the defendant bank, and that she was not transferred or recalled to a similar position at another location of the bank; Number 3, that she was qualified to work in a similar position at another location of the bank; and finally, Number 4, that her age was one of the determining factors that caused the defendant not to transfer or to recall her to a similar position at another location of the bank. Plaintiff must prove that the defendant intended to discriminate against her because of her age.

Defendant denies that it discharged the plaintiff or failed to transfer or recall her because of her age. Its says that she was discharged because the Diane Branch where she worked was closed for legitimate business reasons. It says that the plaintiff was not rehired, because she never made a formal application for reemployment, and that her informal inquiry to the president and Chief Executive Officer was not in good faith, as the plaintiff rudely and unpleasantly accosted him, knowing that her actions would insure that she would not be rehired.

The plaintiff was not a union employee, and since there was no seniority system, the fact that she was employed as a teller longer than some other employees, does not in and of itself, prove age discrimination.

Defendant as an employer is entitled to make its own subjective business judgments regarding the selection of employees for termination, so long as it does not discriminate on the basis of age. You, the jury, may not substitute your judgment for that of the defendant in this matter, even though you personally may not approve of the defendant's exercise of its judgment and you personally would have acted differently.

The law does not require that advanced age and substantial length of service entitle employees to special favorable consideration, and it does not require that an employer adopt a policy that will maximize the number of older employees in its work force.

If you find that the reasons given by the defendant for its discharge of the plaintiff and its failure to rehire her are not the true reasons, and that the true reason is that the plaintiff was an older employee, then your verdict must be for the plaintiff.

In summary, the burden is on the plaintiff to prove each of the four parts of her claim by a preponderance of the evidence. If she fails to do so, your verdict would be for the defendant. If she carries that burden, then your verdict must be for the plaintiff. And in that event, you would then turn to the issue of damages.

Damages for violation of the age discrimination law consists of back pay, up to the date of trial, which the plaintiff would have earned had she not been unlawfully discharged. It also includes all accrued employee benefits, up to the date of trial, which the plaintiff would have received had she not been unlawfully discriminated against.

You may not award damages for emotional distress, embarrassment, humiliation or mental anguish. Neither may you award damages for punitive reasons. You may not award damages to punish the defendant. Damages that you award are designed to put plaintiff in the place that she would have been if she had not been discriminated against.

Plaintiff has a duty to mitigate or reduce her damages. And if you find that she should have or could have been more diligent in seeking other employment after her discharge, then your back pay award may be reduced by the amount she could have earned by seeking and accepting other employment. Your damages must not be based on mere speculation, guess or conjecture.

Of course, the fact that I have given you these instructions concerning the issue of plaintiff's damages should not be interpreted by you in any way as an indication that I believe that the plaintiff should or should not prevail in this case.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each

juror agree to it. In other words, your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view towards reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your own views and to change your mind, if you are convinced that you are wrong. But don't give up your honest conviction as to the weight or the effect of the evidence just because of the opinion of your fellow jurors, or for the sole purpose of returning a verdict. Remember at all times that you are not partisans. You are judges, judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you retire to the jury room, you should first select one of your number to be your foreman, who will be your spokesperson here in court and who will preside over your deliberations.

Forms of verdict have been prepared for your convenience. If you find that the plaintiff has proved each element of her case by a preponderance of the evidence, you would use that form of verdict which reads: "We the jury in the above-entitled and number case find in favor of the plaintiff Sarah Formby and against the defendant Farmers & Merchants Bank and award damages in the amount of" blank.

If you find that the plaintiff has not carried her burden of proof by a preponderance of the evidence, you would use that form of verdict that reads: "We the jury in the above-entitled and numbered case find in favor of the defendant Farmers & Mer-

chants Bank."

You will take these forms of verdict with you, along with the exhibit when you go into the jury room. When you reach unanimous decision as to your verdict, the foreman will select the appropriate form, complete it by signing it and dating it, and in the event you find for the plaintiff, filling the appropriate amount of money that you find to be the damages plaintiff has suffered. You will then return to the courtroom. I caution, however, that with respect to any message or question you might send, that you should never tell me what your numerical division is at the time.

Counsel, the objections which we have taken up at the charge conference are preserved for the record. Are there any other objections?

MR. RHEA: No other objections.

MR. SHUMAKER: None, your Honor.

THE COURT: All right. Ladies and gentlemen, you may retire and consider your verdict.

(Jury out to deliberate at 3:08 P.M.)

THE COURT: We'll be in informal recess, subject to the call of the jury.

(In open court, jury present at 5:00 P.M.)

THE COURT: Ladies and gentlemen of the jury, have you reached a verdict?

THE FOREMAN: Yes, we have, your Honor.

THE COURT: Clerk will receive the verdict. Clerk will read the verdict.

THE CLERK: In the matter of Sarah Formby versus Farmers & Merchants Bank, Case Number CV-85-C-2658-M, we the jury in the above-entitled and numbered case find in favor of the

plaintiff Sarah Formby and against the defendant, Farmers & Merchants Bank and ward damages in the amount of nineteen thousand four hundred dollars.

THE COURT: Is there a request that the jury be polled?

MR. RHEA: Please, sir. We do request it.

THE COURT: Clerk will poll the jury.

THE CLERK: As I call your name, will you please state whether this is or is not your true verdict. If it is, please state it is; if it is not, please state it is not.

(Whereupon, the verdict was unanimous.)

THE COURT: Ladies and gentlemen, thank you so very much for your cooperation and patience this week. We are all indebted to you for the tremendous public service that you have rendered. You'll now be excused, and you'll receive a check from us for your service here. Thank you again.

(Jury excused at 5:03 P.M.)

THE COURT: The only remaining matter is that of the liquidated damages and attorney's fees.

MR. RHEA: And attorney's fees. I don't want to make a big issue at this point, but I don't want it to be overlooked. Judge has been a trial lawyer, fortunately.

THE COURT: On the issue of liquidated damages, I would double the amount of the jury's award. On the question of attorney's fees, I take it the standards of the *Johnson versus Georgia Highway Express* would apply. And I will invite counsel to try to work out a reasonable attorney's fee, it they can.

MR. RHEA: We'll try.

THE COURT: If they cannot by the 9th of March, Mr. Rhea, submit to Mr. Pruett and Mr. Shumaker, a statement of your hours

and description of your services rendered, and a claim for any out-of-pocket expenses incurred. And once you submit the statement, if you file a motion, I will set the matter down for hearing.

But for clerical purposes, the Court's order doubling the amount of the jury's award, assessing an attorney's fee and taxing costs against the defendant will close the case for purposes of appeal. As you understand, the attorney's fee issue is separate and we'll treat it separately.

MR. PRUETT: Yes, your Honor.

THE COURT: Thank you all. Court is adjourned.

(Court adjourned at 5:06 P.M.)

CERTIFICATE

"I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter."

Penny L. Enoch Date

APPENDIX E

AGE DISCRIMINATION IN EMPLOYMENT ACT
29 U.S.C. SECTION 621 et. seq.

Section 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that -

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act [29 USCS Sections 621 et. seq.] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Section 622. Education and research program; recommendation to Congress [This section is not material to this petition.]

Section 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act [29 USCS Sections 621 et seq.].

(b) Employment agency practices. It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices. It shall be unlawful for a labor organization -

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; Participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act [29 USCS

Sections 621 et seq.].

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc. It shall be unlawful for an employer, labor organization or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause. It shall not be unlawful for an employer, employment agency, or labor organization -

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act [29 USCS Sections 621 et seq.], except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act [29 USCS Section 631(a)] because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

Section 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports [This section is not material to this petition.]

Section 625. Administration [This section is not material to this petition.]

Section 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations. The secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 USC 209 and 211) [29 USCS Sections 209, 211].

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion. The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 211(b), 216, 217) [29 USCS Sections 211(b), 216, 217], and subsection (c) of this section. Any act prohibited under section 4 of this Act [29 USCS Section 623] shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 USC 215) [29 USCS Section 215]. Amounts owing to a person as a result of a violation of this act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 216, 217) [29 USCS Sections 216, 217]: Provided, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this act through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial.

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this act.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

(d) Filings of charge with Secretary; timeliness; conciliation, conference, and persuasion. No civil action may be commenced by an individual under this section 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed -

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) [29 USCS Section 633(b)] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under States law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Statute of limitations; reliance in future on administrative rulings, etc.; tolling.

(1) Sections 6 and 10 of the Portal-to-Portal Act of 1947 [29 USCS Sections 255 and 259] shall apply to actions under this Act.

(2) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this Act

through informal methods of conciliation, conference, and persuasion pursuant to subsection (b), the statute of limitations as provided in section 6 of the Portal-to-Portal Act of 1947 [29 USCS Section 255] shall be tolled, but in no event for a period in excess of one year.

Section 627. Notices to be posted [This section is not material to this petition.]

Section 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code [5 USCS Sections 551 et seq.], the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this act, and may establish such reasonable exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest.

Section 629. Criminal penalties [This section is not material to this petition.]

Section 630. Definitions [This section is not material to this petition.]

Section 631. Age limits

(a) Individuals at least 40 but less than 70 years of age. The prohibitions in this Act [29 USCS Section 621 et seq.] shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

(b) Employees or applicants for employment in Federal Government. In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 15 of this Act [29 USCS Section 633a], the prohibitions established in section 15 of this Act [29 USCS Section 633a] shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives of high policy makers.

(1) Nothing in this Act [29 USCS Sections 621 et seq.] shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $27,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Secretary, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(d) Employees serving under contracts of unlimited tenure at institutions of higher education. Nothing in this Act [29 USCS Section 621 et seq.] shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965 [20 USCS Section 1141(a)]).

Section 632. Annual report to Congress [This section is not material to this petition.]

Section 633. Federal-State relationship [This section is not material to this petition.]

Section 633a. Nondiscrimination on account of age in Federal Government employment [This section is not material to this

petition.]

Section 634. Authorization of appropriations [This section is not material to this petition.]

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

OVERRULED 12/18/86
s/U.W. Clemon, Judge

SARAH FORMBY,	)	
	)	
Plaintiff,	)	CASE NO.
	)	
v.	)	CV-85-C-2658-M
	)	
FARMERS AND MERCHANTS BANK,	)	
	)	
Defendant.	)	

FILED
SEPT 12 1986
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
CHARLES T. OLIVER, CLERK

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT

Comes now the defendant in the above-styled cause, Farmers and Merchants Bank, and moved this Court under Rule 56, Federal Rule of Civil Procedure to grant summary judgment in favor of the defendant or in the alternative, to grant partial summary judgment in favor of the defendant as to the claim set forth by the plaintiff in the amendment to her complaint, and shows in support of thereof that there is no dispute as to any material fact and that the defendant is entitled to judgment as a matter of law. The defendant shows that the plaintiff has failed to produce any evidence whatsoever that age played any part in the termination of her employment from Farmers and Merchants Bank. Defendant relies in support of this motion on all pleadings and depositions filed in this action. The defendant prays that if the Court should

decline to grant summary judgment as to the entire case, that in the alternative the Court will grant partial summary judgment as to the claim set forth in the plaintiff's amended complaint, that is, that failure to recall the plaintiff constitutes age discrimination. Defendant contends that failure to recall a terminated employee constitutes a separate claim under the Age Discrimination and Employment Act, 29 U.S.C. Section 621 et seq. and that failure of the plaintiff to timely file a separate charge with the Equal Employment Opportunity Commission as to the "failure to recall" claim precludes the plaintiff from bringing an action on that claim or amending her previously filed action to add such a claim.

The defendant submits a brief in support of this motion simultaneously herewith.

S/Kay S. Kelly

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CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing on counsel of record by placing same in the United States Mail, postage prepaid and properly addressed on this the 12th day of September, 1986.

S/Kay S. Kelly

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

SARAH FORMBY,	)	
	)	OVERRULED 3/3/87 s/U. W. Clemon, Judge
Plaintiff,	)	
	)	
v.	)	CASE NO.
	)	85-C-2658-M
FARMERS &	)	
MERCHANTS BANK,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT NOTWITHSTANDING THE VERDICT OR, ALTERNATIVELY, FOR A REMITTITUR OR A NEW TRIAL

The Farmers & Merchants Bank, a corporation, Centre, Alabama ("the Bank") respectfully moves this Court pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure to (a) set aside the judgment heretofore entered in this Court of February 11, 1987 or, in the alternative, (b) for a remittitur of same, or (c) for a new trial and states as grounds therefor the following:

1. On February 11, 1987 the jury returned a verdict for the plaintiff and against the Bank in the amount of $19,400.00. A copy of this judgment is attached hereto as Exhibit "A".

2. The Court erred in failing to grant the Bank a directed verdict on Count I of the plaintiff's complaint, the discharge issue, and the subsequent submission of that issue to the jury. During the

charge conference, the Court inquired whether there was any evidence that the Bank's Diane Branch had been closed for anything other than a legitimate business reason. Counsel for the plaintiff conceded that he did not know of any. The Court then stated that:

> I don't know of any evidence on that — any evidence contrary to that. So, I am going to treat this case a failure to recall case over the objection of the plaintiff, of course. Plaintiff has an objection and an exception to the Court's failure to treat it as a discharge case. (T. 83)

The Court then charged the jury as to the plaintiff's claims of discharge *and* failure to recall. (T. 150-52)

3. The Bank avers that the Court erred in failing to grant the Bank a directed verdict on Count II of the plaintiff's complaint, the failure to recall issue, and the subsequent submission of that issue to the jury as the Court did not have jurisdiction of such a claim. The filing of a claim with the EEOC is jurisdictional for the prosecution of an age discrimination case. The Bank avers that the plaintiff's claim in the instant case is related only to her termination of employment with the Bank. A copy of the plaintiff's EEOC charge is attached hereto as Exhibit "B". No charge of age discrimination was filed by the plaintiff with respect to the failure of the Bank to recall her to her employment or to rehire her.

4. The Court erred in failing to grant the Bank's motion for a directed verdict with respect to Count II of the plaintiff's complaint as the failure to recall or rehire an employee is not a continuing violation of the ADEA unless the employer is under a contractual obligation to recall or rehire that employee. No such

contractual obligation existed in the instant case.

5. The Court erred in allowing Count II of the plaintiff's compliant, the failure to recall issue, to go to the jury as the plaintiff had not proved that a formal application for reemployment with the Bank ever was made by the plaintiff following her termination.

6. The jury verdict was contrary to the evidence in this case as there was no evidence which would support a finding of age discrimination with respect to the termination of the plaintiff or the Bank's failure to recall or rehire her at a later date. The only testimony that could be construed to reflect in any way on the age of the plaintiff is an alleged statement by a former employee of the Bank that:

> And he [Richard Skates] named the other people that were being terminated. He also said that he — *far be it from he to let a young pretty girl go* — that was in regards to one that he had told me he was terminating. Although she was hired back within the next week. But, I didn't know — I just needed a job. I love to work at the Bank. (T. 44) [emphasis supplied]

The evidence in this case was undisputed that in addition to the plaintiff, the Bank also terminated other employees who were younger than the plaintiff. The plaintiff was terminated because her position was eliminated with the closing of the Bank's Diane Branch. The other employees were terminated as a part of a general staff reduction.

7. The jury's verdict is against the great weight of the evidence. The Bank's chief executive officer and chairman of the board, W. Eugene Rutledge, testified that at the time he made the decision to close the Diane Branch and eliminate the jobs associ-

ated therewith that he knew absolutely nothing about the personnel, i.e., their names, ages, etc., at the Diane Branch. (T. 92) Mr. Rutledge further testified that following his acquisition of control of the Bank in November, 1984, he made every personnel decision with respect to the Bank (T. 95) and that he never say Mrs. Formby until January 26, 1985. (T. 97) The Bank further shows that it could not have been guilty of age discrimination with respect to the plaintiff because the person making the decision with respect to her termination did not (at the time that the decision was made) know her age.

8. The entry of the jury verdict is against the great weight of the evidence, as Mr. Rutledge testified at their January 26, 1985 meeting he invited Mrs. Formby to come by his office to discuss the matter of her reemployment. The evidence is undisputed that the plaintiff never applied with him for reemployment with the Bank. (T. 99) The failure of the plaintiff to discuss reemployment with Mr. Rutledge should operate as a complete defense for the Bank for all of the plaintiff's lost wages from that date, January 25, 1985.

9. The verdict of the jury is contrary to the evidence in this case.

10. The verdict of the jury is contrary to the law in this case.

11. The Court erred in denying the Bank's motion for a directed verdict at the close of the plaintiff's case and at the close of all the evidence in this case.

S/Clyde E. Riley

OF COUNSEL:
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1300 Brown Marx Tower
Birmingham, Alabama 35203
Telephone: (205) 322-8761

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S/Albert S. Shumaker,
Attorneys for Defendant

OF COUNSEL:
BURNS, SHUMAKER & DAVIS
270 East Main Street
Centre, Alabama 35960

CERTIFICATE OF SERVICE

I do hereby certify that I have mailed a copy of the foregoing to Clarence Rhea, Esq. on this the 20th day of February, 1987.

S/Clyde E. Riley
Of Counsel

JUDGMENT ON JURY VERDICT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Civil Action File No. 85-C-2658-M

SARAH FORMBY,
Plaintiff,

VS

FARMERS AND MERCHANTS BANK

Filed February 12, 1987
United States District Court
Northern District of Alabama
Charles T. Oliver, Clerk

Judgment
ENTERED
February 12, 1987

CLERK'S COURT MINUTES

This action came on for trial on February 9, 1987 before the Court and a jury, Honorable U. W. Clemon, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED and ADJUDGED that the plaintiff Sarah Formby have and recover of the defendant Farmers and Merchants Bank the sum of $19,400.00, in accordance with verdict of the jury this day filed as follows:

"We the jury, find in favor of the plaintiff Sarah Formby and against the defendant Farmers and Merchants Bank and award damages at $19,400.00;" and taxing costs against the defendant

It is further ORDERED that the defendant pay direct to the attorneys of record for the plaintiff the proceeds of the judgment and costs recovered herein by the plaintiff, and that upon receipt thereof, the attorneys of record for the plaintiff will satisfy said

MARKED "Exhibit A"

judgment on the records of this court.

DATED: February 11, 1987

Gadsden, Alabama

Court Reporter: Penny Enoch

CHARLES T. OLIVER,
CLERK
By:
S/David Smitherman
Deputy Clerk

Charge Discrimination

This form is effected by the Privacy Act Statement on reverse.
Read before completing this form.

☐ EEPA
☒ EEOC
042850818

and EEOC

(State of local Agency, if any)

Name (Indicate Mr., Ms., or Mrs.) — Home Telephone No. (Area Code)

Mrs. Sara Ruth Formby — (205) 927-5643

Street Address — City, State and Zip Code — County

204 Best Street — Centre, AL 35960 — Cherokee

NAMED IS THE EMPLOYER, LABOR ORANGIZATION, EMPLOYMENT AGENCY, APPRETICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

Name — No. of Employers/Members — Telephone Number

Farmers & Merchants Bank — Over 15 — (205) 927-3691

Street Address — City, State and Zip Code

P. O. Box 220 — Centre, AL 35960

Name — Telephone Number

Street Address — City, State and Zip Code

Cause of Discrimination Based on (Check appropriate box(es))

☐Race ☐Color ☐Sex ☐Religion ☐National Origin
XXAge ☐Retaliation ☐Other(Specify)

DATE MOST RECENT OR CONTINUING DISCRMINATION TOOK PLACE (Month, day, year)

12-14-84

The Particulars are (if additional space is needed, attached extra sheet(s)):

I. On December 14, 1984, I was discharged from my position of bank teller by the above named employer. I was hired in September 1974.

II. Richard Skates, Executive Vice President, informed me that I was being discharged because the Diane Branch office where I was employed was being closed, and the staff reduced.

III. I believe that I have been discriminated against because my age, 59. The following information supports my belief:

a. My date of birth is June 4, 1925.

b. Of three bank tellers I was the only teller over age 50 that was discharged

c. I was replaced by a female less than age 50.

SEAL:

RECEIVED EEOC - BIRMINGHAM DISTRICT FEBRUARY 6, 1985

I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

Notary — S/Martha Garrett — My Commission expires 5-6-86

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Signature of Complainant

2/1/85
Date

H S/Sara Formby
Charging Party(Signature)

Subscribed and Sown to Before me this date (Day, month, and year)

EEOC

MARKED "Exhibit B"

APPENDIX H

Charge Discrimination

This form is effected by the Privacy Act Statement on reverse.
Read before completing this form.

[ ] EEPA
[X] EEOC 042850818

_____ and EEOC
(State of local Agency, if any)

Name (Indicate Mr., Ms., or Mrs.) | Home Telephone No. (Area Code)

Mrs. Sara Ruth Formby | (205) 927-5643

Street Address | City, State and Zip Code | County

204 Best Street | Centre, AL 35960 | Cherokee

NAMED IS THE EMPLOYER, LABOR ORANGIZATION, EMPLOYMENT AGENCY, APPRETICE-SHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

Name | No. of Employers/Members | Telephone Number

Farmers & Merchants Bank | Over 15 | (205) 927-3691

Street Address | City, State and Zip Code

P. O. Box 220 | Centre, AL 35960

Name | Telephone Number

Street Address | City, State and Zip Code

Cause of Discrimination Based on (Check appropriate box(es))

[ ]Race [ ]Color [ ]Sex [ ]Religion [ ]National Origin
[X]Age [ ]Retaliation [ ]Other(Specify)

DATE MOST RECENT OR CONTINUING DISCRMINATION TOOK PLACE (Month, day, year)
12-14-84

The Particulars are (If additional space is needed, attached extra sheet(s)):

I. On December 14, 1984, I was discharged from my position of bank teller by the above named employer. I was hired in September 1974.

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RECEIVED EEOC - BIRMINGHAM DISTRICT FEBRUARY 6, 1985

I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

Notary S/Martha Garrett
My Commission expires 5-6-86
I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

2/1/85
Date

H S/Sara Formby
Charging Party(Signature)

Signature of Complainant

Subscribed and Sown to Before me this date (Day, month, and year)

EEOC

No. 87-1659

Supreme Court, U.S.
FILED
APR 26 1988
JOSEPH E. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

FARMERS & MERCHANTS BANK,

Petitioner,

v.

SARAH FORMBY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT SARAH FORMBY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLARENCE F. RHEA
RHEA, BOYD & RHEA
930 Forrest Avenue
Gadsden, AL 35901
(205) 547-6801

April, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether review of the Court of Appeals' decision by writ of certiorari is appropriate given the fact that the trial court's charge to the jury accurately stated the law and eliminated the issues raised by the question urged by the Bank in its Petition?

2. Whether petition for certiorari to the Supreme Court of the United States is the appropriate vehicle to review for the fourth time the facts which make up this case?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	2
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES:

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) 4

United States v. Johnson, 268 U.S. 220, 45 S.Ct. 496 (1925) 6

STATEMENT OF THE CASE

Respondent Sarah Formby cannot accept Petitioners' Statement of the Case because of omissions and misstatements that are significant to this Petition. Respondent (hereinafter referred to as Ms. Formby) is 61 years of age and worked for the Petitioner Bank from September, 1974 until December 14, 1984. (App. D. pg. 35).*

Ms. Formby was employed as a teller in the main branch of the Bank and a drive-in teller waiting on customers, receiving deposits, cashing checks and accepting loan payments. (App. D. pgs. 35-36). She worked in the branch when the manager was absent or on vacation and was acting branch manager, balancing the vault and seeing that the drawers were balanced, etc. (App. D. pg. 36).

The overwhelming consensus of the evidence reflected that Ms. Formby was a highly capable and competent employee. (App. D. pgs. 18-19, Concession by attorney for Petitioner Bank; App. D. pgs. 21, 28, 33, 36).

In December, 1984, Ms. Formby was terminated and was advised that there were other younger persons who were being terminated at the same time. However, within one (1) week the other employees were returned to employment with the Bank. (App. D. pgs. 41-42; 79-80). Although she requested on at least a couple of occasions to return to work with the Bank, her requests were refused (App. D. pg. 79).

Finally, Petitioner's Statement of the Case recounts testimony offered by its primary witness (Bank Petition

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*All references to the transcript are to Bank's Petition and the Appendices attached thereto.

pg. 7). The Bank's statement reflects testimony offered by Mr. Rutledge. However the countertestimony that was presented by Ms. Formby effectively stated that at the time she approached Mr. Rutledge about being re-employed with the Bank, she approached Mr. Rutledge in a manner that was not angry and merely asked for a job. (App. D. pg. 99).

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari should be denied because (1) the petition is in reality a request that the Court again review the facts of the case; (2) the trial court's charge to the jury accurately stated the law and removed from consideration the issues raised by the Petitioner.

ARGUMENT

Many Issues Presented in the Petition Were Resolved by the Trial Court's Charge

The trial court's charge to the jury properly stated the law and clearly covered the concerns addressed in the Petitioner's questions numbered 1, 3, 4 and 5 (Brief of Petitioner, pg. 1).

In his charge, the Honorable U. W. Clemon, District Judge, told the jury the following:

> The plaintiff was not a union employee, and since there was no seniority system, the fact that she was

> employed as a teller longer than some other employees, does not in and of itself, prove age discrimination.
>
> • • •
>
> The law does not require that advanced age and substantial length of service entitle employees to special favorable consideration, and it does not require that an employer adopt a policy that will maximize the number of older employees in its work force.

(App. D. pg. 126).

The aforementioned portion of the charge to the jury, to which there was no exception by either party, clearly addresses, to the benefit of the Petitioner, the issues raised in question 1 (is priority accorded to the recall of persons within the protected age group under the ADEA); question 3 (is an employee in the protected age group entitled to more favorable treatment than other employees because of seniority); question 4 (does an employer have a duty to accord an employee within the protected age group more favorable treatment over other employees not in the protected age group when making employment decisions); question 5 (is an employer required to bump employees not within the protected age group under the ADEA in favor of employees within the protected age group or with less seniority).

Clearly, the petitioner is simply attempting to raise issues that might excite the Court. However, a review of the proceedings below and the charge of the Court as set out herein squarely addresses these issues and it is sub-

mitted should eliminate them from a consideration in the petition.

Petitioner's argument that the trial court and the Eleventh Circuit failed to follow the procedure of proof established by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), is without basis. (Bank Petition pg. 17). The trial court in its charge clearly delineated the standard required of Ms. Formby:

> In order to win on her claim, the plaintiff must prove each of the following things by a proponderance of the evidence: Number 1, that she was within the protected age group; that is she was between age forty and age seventy; Number 2, that she was discharged from the Diane branch by the defendant bank and that she was not transferred or recalled to a similar position at another location of the bank; Number 3, that she was qualified to work in a similar position at another location of the bank; and finally, Number 4, that her age was one of the determining factors that caused the defendant not to transfer or recall her to a similar position at another location of the bank. Plaintiff must prove that the defendant intended to discriminate against her because of her age.
>
> Defendant denies that it discharged the plaintiff or failed to transfer or recall her because of her age. It says that she was discharged because the Diane Branch where she worked was closed for legitimate business reasons. It says the plaintiff was not rehired, because she never made a formal application for reemployment, and that her informal inquiry to the president and Chief Executive Officer was not in good faith, as the plaintiff rudely and unpleasantly accosted him, knowing that her actions would insure that she would not be rehired.
>
> * * *

> Defendant as an employer is entitled to make its own subjective business judgments regarding the selection of employees for termination, so long as it does not discriminate on the basis of age. You, the jury, may not substitute your judgment for that of the defendant in this matter, even though you personally may not approve of the defendant's exercise of its judgment and you personally would have acted differently.

(App. D. pgs. 125-126).

Based upon the foregoing it is clear that the trial court's charge to the jury established the appropriate legal standards by which the jury was to assess the evidence.

Certiorari is Not a Vehicle to Review—for a Fourth Time—the Facts of a Case

Initially, the jury considered the facts on the basis of appropriate instructions from the trial court. Further, the jury was able to consider the demeanor of the witnesses, the credibility of the testimony and apply their judgment to the law as provided to them by the court. After a verdict, adverse to the Bank, Petitioner filed a motion for Entry of Judgment Notwithstanding the Verdict or Alternatively, for a Remittur or a New Trial. (Bank Petition App. G). After consideration of the same, the trial judge overruled the said motion. (Bank Petition App. G).

The Eleventh Circuit, with a panel consisting of Chief Judge Roney, Circuit Judge Tjoflat and the Honorable M.M. Paul, United States District Judge for the Northern District of Florida, sitting by designation, unanimously affirmed the verdict of the jury and upheld Judge

Clemon's view of the facts and denial of the Bank's petition. Furthermore, the same panel unanimously denied the Bank's petition for rehearing and/or rehearing in banc. (Bank's Pet. App. B-C). The Petitioner calls on this Court to make a fourth review of the trial record to determine if it can find something two previous courts unanimously agreed did not exist—error. Further, this petition is not a vehicle for a re-review of the facts: "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227, 45 S.Ct. 496, 497 (1925). In the present case, Petitioner raises only questions turning entirely on facts in this case, already resolved three times in favor of Respondent and without any impact outside the elements of this case. Certiorari for this reason should be denied.

Finally, the Petitioner attempts to raise questions again for the fourth time regarding the sufficiency of the charge filed by the Respondent with the Equal Employment Opportunity Commission. Under the facts in this case, which again have previously been addressed by the district court and the Eleventh Circuit, it has been determined that the charge was appropriate to encompass the failure to recall issue. As a review of the statement of the case submitted herein will reveal, the Respondent did not file her charge with the EEOC until after the two younger employees had been recalled to work (approximately one (1) week after they had all been ostensibly terminated). Furthermore, in her charge of discrimination, Respondent alleges that she was replaced by a younger female. Under the factual scenario of the case, the only individuals who could have replaced the Respondent were those individuals discussed by Mr. Rutledge in his testimony that is, those

two ladies who were recalled shortly after their termination.[1] Once again, the Petitioner is merely asking the Court to review the factual setting of this case. It is submitted that this effort should be denied.

———o———

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/ Clarence F. Rhea
Attorney for Respondent

OF COUNSEL:

Rhea, Boyd & Rhea
930 Forrest Avenue
Gadsden, AL 35901
(205) 547-6801

---

[1]The issue regarding the Respondent's charge of discrimination with the EEOC is also a factual dispute. The wording of the charge and the timing of the charge clearly reflect that the Respondent filed the charge after the other younger employees were recalled and Respondent's charge even references a claim that she was replaced by a female less than 50 years of age. (See Bank Pet. App. H). The facts as established at the time of the filing of the charge clearly put the Bank on Notice of the recall claim in as much as the Respondent had charged that the Bank had recalled younger employees in Paragraph Numbered IIIc of the EEOC charge.